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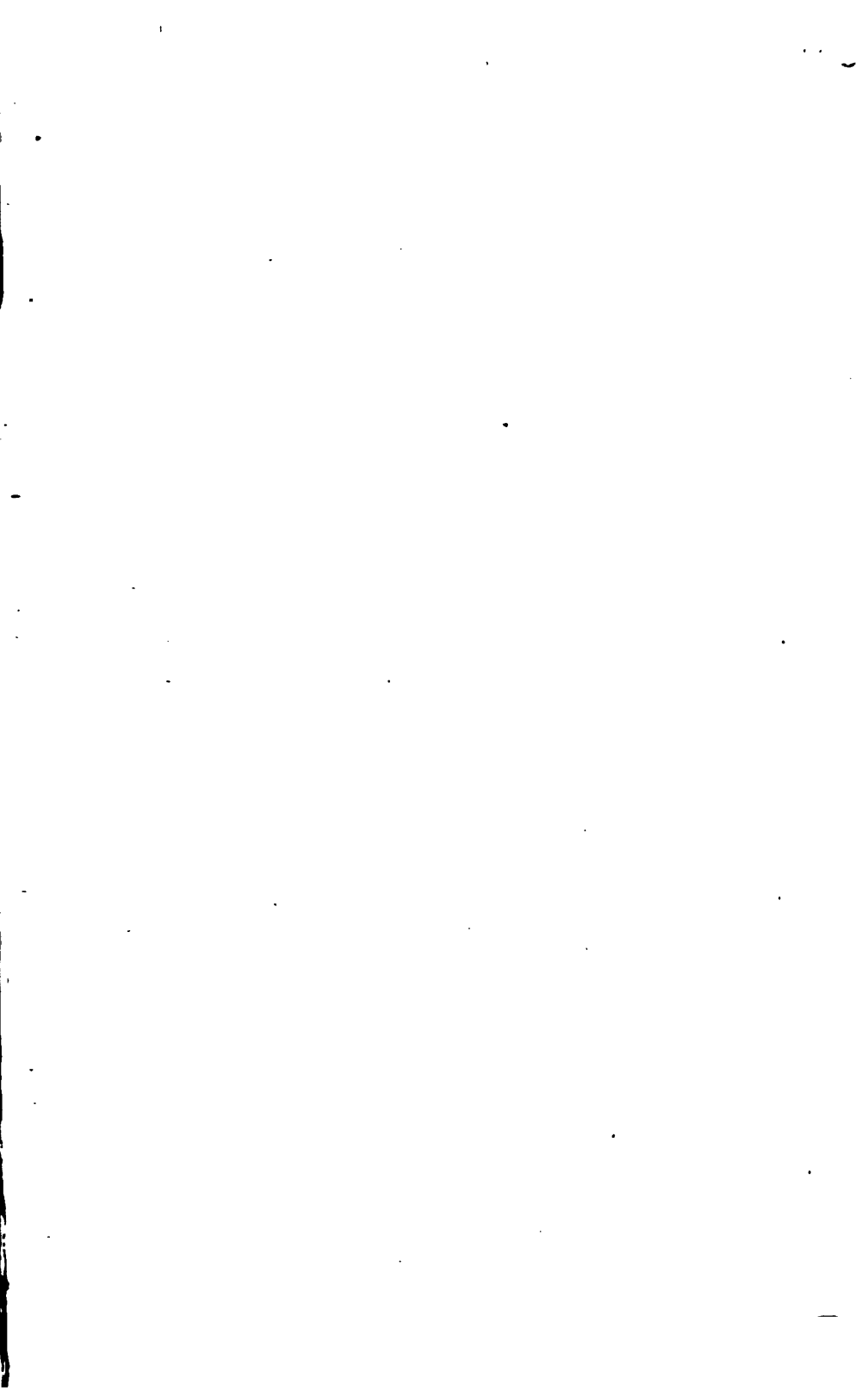
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER

REPORTER

VOLUME 94

FROM OCTOBER 21, 1919, TO JANUARY 26, 1920

SAN FRANCISCO
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1920

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JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

January 20, 1920.

First Judicial District—

Jackson..... }
Josephine..... } FRANK M. CALKINS, Medford.

Second Judicial District—

Benton..... }
Douglas..... } JAMES W. HAMILTON, Roseburg.
Curry..... }
Coos..... } JOHN S. COKE, Marshfield.
Lane..... }
Lincoln..... } GEORGE F. SKIPWORTH, Eugene.

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Linn..... } PERCY B. KELLY, Department No. 1, Albany.
Marion..... } GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah..... }
JOHN P. KAVANAUGH, Department No. 1, Port-
land.
ROBERT G. MORROW, Department No. 2, Port-
land.
ROBERT TUCKER, Department No. 3, Portland.
GEORGE W. STAPLETON, Department No. 4, Port-
land.
WILLIAM N. GATENS, Department No. 5, Port-
land.
JOHN McCOURT, appointed December 1, 1919,
succeeding CALVIN U. GANTENBEIN, Depart-
ment No. 6, Portland.
GEORGE TAZWELL, Department No. 7.

Fifth Judicial District—

Clackamas..... JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow..... }
Umatilla..... } GILBERT W. PHILIPS, Pendleton.

Seventh Judicial District—

Hood River..... }
Wasco..... } FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker..... GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant..... }
Harney..... } DALTON BIGGS, Ontario.
Malheur..... }

Tenth Judicial District—

Union.....	}	JOHN W. KNOWLES, La Grande.
Wallawa.....		

Eleventh Judicial District—

Gilliam.....	}	DAVID B. PARKER, Condon.
Sherman.....		
Wheeler.....		

Twelfth Judicial District—

Polk.....	}	HARRY H. BELT, Dallas.
Yamhill.....		

Thirteenth Judicial District—

Klamath... ..	DELMON V. KUYKENDALL, Klamath Falls.
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Fourteenth Judicial District—

Lake.....	L. F. CONN, Lakeview.
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Eighteenth Judicial District—

Crook.....	}	T. E. J. DUFFEY, Prineville.
Deschutes.....		
Jefferson.....		

Nineteenth Judicial District—

Tillamook.....	}	GEORGE R. BAGLEY, Hillsboro.
Washington.....		

Twentieth Judicial District—

Clatsop.....	}	JAMES A. EAKIN, Astoria.
Columbia.....		

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

January 20, 1928.

County.	Name.	Official Address.
Baker.....	Levens, W. S.	Baker
Benton.....	Clarke, Arthur	Corvallis
Clackamas.....	Hedges, Gilbert L.	Oregon City
Clatsop.....	Barratt, Jasper J.	Astoria
Columbia.....	Metsker, Glen B.	St. Helens
Coos.....	Hall, John F.	Marshfield
Crook.....	Wirtz, Willard H.	Prineville
Curry.....	Buffington, Collier H.	Gold Beach
Deschutes.....	Moore, Arthur J.	Bend
Douglas.....	Neuner, George, Jr.	Roseburg
Gilliam.....	Weinke, T. A.	Condon
Grant.....	A. D. Leedy, appointed November 1, 1919, succeeding Phil Ashford, resigned. Canyon City	
Harney.....	George S. Sizmore, appointed January 1, 1920, succeeding M. A. Biggs, Resigned. Burns	
Hood River.....	Derby, A. J.	Hood River
Jackson.....	Roberts, G. M.	Medford
Jefferson.....	Boylan, Bert C.	Metolius
Josephine.....	Miller, W. T.	Grants Pass
Klamath.....	Duncan, William M.	Klamath Falls
Lake.....	McKinney, T. S.	Silver Lake
Lane.....	Ray, L. L.	Eugene
Lincoln.....	Geo. B. McCluskey.	Toledo
Linn.....	Hill, Gale S.	Albany
Malheur.....	Swagler, B. W.	Malheur
Marion.....	Gehlhar, Max	Salem
Morrow.....	Notson, Samuel E.	Heppner
Multnomah.....	Evans, Walter H.	Portland
Polk.....	Piasecki, E. K.	Dallas
Sherman.....	Huddleston, C. M.	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Keator, B. I.	Pendleton
Union.....	Hodgin, John S.	La Grande
Wallowa.....	Fairchild, Abijah	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.	Hillsboro
Wheeler.....	Trill, Wallace G.	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued April 24, reargued July 2, reargued July 17, affirmed October 21, 1919.

WRIGHT v. WIMBERLY.*

(184 Pac. 740.)

Equity—Judgment—"Decree" and "Judgment" Distinguished.

1. The final determination of an action at law by a court in Oregon is called a "judgment," while that of a suit in equity is denominated a "decree."

Mortgages—Construction of Statutes Regulating Foreclosure.

2. No rule having existed at common law respecting the foreclosure of mortgages, statutes regulating the procedure in such a case are not in derogation of common law and should not be strictly construed.

Mortgages—Foreclosure by Granting Equity of Redemption not of Common-law Origin.

3. Unless a custom of the common law had its origin when the memory of man runneth not to the contrary, or from the beginning of the reign of Richard I, the rule could not be classed as part of the common law, so that foreclosure of mortgages by granting equity of redemption is not of common-law origin, having been instituted probably in the reign of Queen Elizabeth.

Statutes—Liberal Construction of Remedial Enactments.

4. While statutes conferring special privileges on individuals should be construed strictly against them, enactments to redress existing grievances and for the protection of rights are remedial and should be liberally interpreted.

Constitutional Law—Statute Protecting All Members of Class not Class Legislation.

5. Legislation which protects alike all the members of a class that are or may be affected thereby is not obnoxious to Article I, Section 20, of the Constitution.

*On effect of statutory provisions abolishing deficiency judgment for mortgage debt, see note in 45 L. E. A. (N. S.) 247. REPORTER.

Mortgages—Foreclosure as Bar to Action for Deficiency.

6. Although Section 426, L. O. L., abolishing deficiency judgments upon foreclosure of real estate purchase price mortgages, does not so modify Section 429, relating to action at law on indebtedness secured by mortgage, as to prevent the holder of purchase-money mortgage note from disregarding the mortgage and bringing action for personal judgment on the note; yet, where such holder does sue to foreclose, then, since the court is inhibited by Section 426 from awarding under Section 425 a conditional recovery or "deficiency judgment" against the mortgagor, its determination of the entire sum due upon the personal obligation, as required by Section 422, is not equivalent to decreeing recovery thereof, except only as the award is limited to the mortgaged realty; and, as the foreclosure sale necessarily exhausts the power given to the court, the effect as *res judicata* of the decree thus denying deficiency judgment is to prohibit a later separate action at law by the mortgagee for such a deficiency.

Appeal and Error—Duty of Supreme Court to Announce the Law.

7. Under Article VII, Section 3, of the Constitution, when some other determination necessarily follows from the conclusion reached, it is the duty of the Supreme Court to announce the law in order to curtail expenses and promote the peace of society.

Evidence—Judicial Notice of Financial Depression.

8. The courts should take judicial notice that in 1897 and for some time thereafter great financial depression prevailed in the Pacific Coast states.

From Douglas: JAMES W. HAMILTON, Judge.

In Banc.

This is an action by A. H. Wright against L. Wimberly and Cora, his wife, to recover money. The facts are that on January 27, 1910, O. C. Jones and his wife in consideration of \$4,000 executed to L. Wimberly a deed of a tract of land in Douglas County, Oregon. The purchaser paid \$1,000 down and thereupon he and his wife executed to Jones a promissory note for \$3,000, maturing on or before ten years with interest at the rate of 6 per cent, payable annually, but if default were made as to any such installments, the principal and interest were to become immediately due and collectible at the option of the holder of the note, and in case suit or action were instituted thereon, the makers promised to pay such additional sum as the

court might adjudge reasonable as attorney's fees. In order to secure the payment of the negotiable instrument, the makers at the time it was given also executed to Jones a mortgage on the real property so purchased. The note was assigned to the plaintiff who, upon default in the payment of interest, elected to treat the entire debt as due and collectible, and thereupon instituted a suit against the defendants herein and others, to foreclose the mortgage. Pursuant to the provisions of Section 426, L. O. L., hereinafter quoted, the lien was foreclosed, but the trial court refused to give a deficiency judgment, whereupon an appeal was taken and such final determination was affirmed: *Wright v. Wimberly*, 79 Or. 626 (156 Pac. 257). Obeying the command of the decree, the sheriff of that county on January 28, 1913, regularly sold the real property so mortgaged for \$2,250, and after deducting the expenses of such sale, the costs and disbursements of the suit, and the further sum of \$300 which was adjudged reasonable as attorney's fees, the remainder of the proceeds, \$1,909, was indorsed on the promissory note.

Allowing credit therefor as a voluntary payment, this action was instituted to recover the balance due on the note with interest from January 28, 1913, and the further sum of \$150 as additional attorney's fees. The complaint states the facts in substance as hereinbefore detailed and alleges in effect that the plaintiff purchased the note in due course, before maturity, for a valuable consideration and without notice or knowledge that the mortgage was executed to secure the payment of the purchase price of the land; that neither the note nor the mortgage indicated that either was given for that purpose; and that it appeared from the deed records of Douglas County, Oregon, that O. C. Jones

conveyed the real property to the defendant L. Wimberly on the day the note and mortgage were executed. The complaint also narrates the suit to foreclose the mortgage, the decree given therein, the sale of the land pursuant thereto, and the credit of the remainder of the proceeds upon the promissory note, and also avers that no other payments than those mentioned had been made.

The allegation in the initiatory pleading, relating to the plaintiff's purchase of the note and mortgage without notice or knowledge that they had been executed to evidence any part of the purchase price of the mortgaged real property, was stricken out upon motion of defendants' counsel. Their demurrer to the remainder of the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, the action was dismissed and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Oliver P. Coshov* and *Mr. Benjamin L. Eddy*.

For respondents there was a brief over the names of *Messrs. Rice & Orcutt* and *Messrs. Neuner & Wimberly*, with oral arguments by *Mr. A. N. Orcutt* and *Mr. Carl Wimberly*.

McBRIDE, C. J.—This cause was argued and submitted April 24, 1918, but owing to the inability of the Justices to agree, was continued for further consideration. The late Justice MOORE, before his death and in fact during his last long illness, prepared an opinion in the case which, in the judgment of the writer, correctly states the law. It is a monument to the faithfulness of the deceased Jurist, to the duties of his office

and the last evidence of that industry which only death could abate. The writer adopts Judge MOORE's opinion as his own and it is here given in full

MOORE, J.—1. Before discussing the questions here involved it should be said that in Oregon, though the same judge usually presides at the trial of actions at law and of suits in equity, these forums are essentially distinct. The final determination of an action at law by a court in this state is called a "judgment," while that of a suit in equity is denominated a "decree." A party who has an equitable defense in a law action is not remediless however, for if a defendant in such action is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may upon filing his answer in the action, also as plaintiff file a complaint in equity in the nature of a cross-bill, the institution of which suit shall stay the proceedings at law, and the case shall thereafter continue as a suit in equity, in which the maintenance of the action at law may be perpetually enjoined by final decree, or allowed to proceed in accordance therewith: Section 390, L. O. L.

With these preliminary observations, attention will be called to some provisions of our statute, relating to the foreclosure of mortgages. The Code adopted October 11, 1862, and which went into effect June 1, 1863 (Deady's Gen. Laws of Oregon 1845-64, p. 139), contained clauses which, having been incorporated in Lord's Oregon Laws, read:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the de-

cree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, in the case of an ordinary decree for the recovery of money": Section 422, L. O. L.

"During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in Section 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part": Section 429, L. O. L.

These and other sections of the Code, relating to the foreclosure of mortgages, which later provisions are not deemed to be involved herein, were in force February 24, 1903, when there was filed in the office of the Secretary of State a statute, which, omitting the enacting clause, is as follows:

"An act to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property.

"Section 1. When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given thereon, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same": Section 426, L. O. L.

Obeing the restriction contained in the clause last quoted, the trial court, though determining the amount

of the debt, evidenced by the promissory note as a charge against the land if it would sell for that much, refused to grant a deficiency judgment in the suit to foreclose the mortgage, if the proceeds of the sale were insufficient for that purpose: *Wright v. Wimberly* 79 Or. 626 (156 Pac. 257). For the same reason the demurrer to the complaint in this action was sustained. The question to be considered is what effect the enactment of Section 426, L. O. L., has upon the prior provisions of the statute hereinbefore set forth.

Mr. Wiltzie in his work on Mortgage Foreclosure (3 ed.), Section 11, says:

"In most states a mortgagee, after default, has three remedies, any one or two or all of which he may pursue concurrently. These remedies are, (1) an action at law to recover the debt, being usually an action on the bond or note, (2) an action in ejectment to obtain possession, and (3) the action of foreclosure; but when he pursues these remedies concurrently, each must be governed by the rules of law applicable to the forum in which it is brought. In some states, however, the action of ejectment can no longer be maintained by the mortgagee for the recovery of the mortgaged premises."

Another author discussing this subject, remarks:

"Furthermore, the mortgagee may, in jurisdictions wherein the rules of the common law prevail, bring an action of ejectment, in addition to his action on the debt secured, or a bill for foreclosure and sale": 19 R. C. L. 512.

To the same effect see, also, Coote, Mort. 518.

It is probable that Section 429, L. O. L., was enacted to prevent the maintenance concurrently of a suit *in rem* to foreclose the mortgage, and of an action *in personam* on the note or other obligation thereby secured.

An exception to the general rule, that when jurisdiction of a cause has been secured by a court of equity for any purpose, power to hear and determine the entire matter will be retained until a final decree is rendered, was recognized by some courts of chancery which held that in suits to foreclose mortgages no personal recovery against a mortgagor could be rendered, even if the property hypothecated was insufficient to pay the debt secured, since a judgment for such deficiency could only be given in an action at law: 19 R. C. L. 667. Such conclusion originally made it necessary, in case the proceeds of a sale of the mortgaged property were insufficient to discharge the entire debt thus secured when that sum was sought to be recovered, to maintain a suit in equity to foreclose the mortgage, and also an action at law to obtain the remainder, thereby incurring the costs and disbursements, incident to two trials: 4 Kent's Com., §§ 182-184; *Hatch v. White*, 2 Gall. 152 (Fed. Cas. No. 6209). In order to avoid such extra expenses statutes have been passed authorizing courts of equity in decreeing the foreclosure of a mortgage, also to award a conditional recovery of the deficiency, if any should be found to exist, after a sale of the mortgaged premises and an application of the proceeds to the debt secured, and without an enactment of that kind it is generally conceded in some states that such a court does not have inherent power to grant relief of that character: Jones, Mort. (7 ed.), § 1711; 9 Ency. Pl. & Pr. 452. In compliance with the supposed requirement that a statute was essential to empower a court of equity in decreeing the foreclosure of a lien, also to award a conditional recovery against the maker of the note, Section 422, L. O. L., was evidently enacted so as to prevent the maintenance of more than one proceeding for the

collection of the debt when resort was had to a court of equity. Thereafter Section 426, L. O. L., was passed to prohibit a court of equity, when decreeing the foreclosure of a lien, from awarding a conditional recovery against the maker of a note or obligation secured by a mortgage executed to evidence a part or the whole of the purchase price of mortgaged real property, thereby limiting the recovery exclusively to such land.

Since the title of the act hereinbefore quoted relates to "the foreclosure of mortgages," it was held that the enactment did not impliedly repeal, amend or modify Section 429, L. O. L., so as to prevent the maintenance of an action at law to recover the amount of a promissory note given to evidence a part of the purchase price of land, though the note was secured by a mortgage of the premises so bought: *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247). It was also decreed that the enactment of Section 426, L. O. L., impliedly amended Section 422, Id., so as to prevent a court of equity upon the foreclosure of a real estate mortgage from awarding a conditional recovery against the maker of a promissory note which was secured by a mortgage given to evidence a part of the purchase price of the mortgaged land: *Wright v. Wimberly*, 79 Or. 626 (156 Pac. 257).

If Section 426, L. O. L., is to be strictly construed, it might follow that an enactment, which was unquestionably designed to benefit a person who had given a mortgage to secure the purchase price of real property, by making an enforced sale thereof pursuant to a decree, the limit of the recovery would impose upon him the costs and disbursements of a suit in equity to foreclose the lien, and also of an action at law to recover the deficiency, if any, when prior to the passage

of the statute he could have been subjected to the expenses of only one trial, while a liberal interpretation of the section will necessarily restrict the costs and disbursements to but one proceeding.

2. No rule existed at common law respecting the foreclosure of mortgages, and this being so, our statutes regulating the procedure in a case of that kind are not in derogation thereof and for that reason should not be strictly construed. In speaking of the rules thus anciently adopted and enforced in England, a noted author observes:

“For the authority of these maxims rests entirely upon the general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it”: 1 Black. Com. *68.

A mortgage at common law was an estate upon a condition subsequent: 2 Black. Com. 154. As soon as the estate was created the mortgagee might immediately enter upon the lands, but he was liable to be dispossessed upon the performance of the condition by payment of the mortgage money at the day limited. It was usual, however, for the parties to agree that until the maturity of the debt the mortgagor should retain possession of the real property, but in case of his failure promptly to discharge the obligation, the mortgagee was entitled to take possession of the premises without any possibility at law of being afterward evicted by the mortgagor, to whom the land was forever thereafter dead: *Id.*, *158. To the same effect see, also, Digby's History of the Law of Real Property (5 ed.), 285.

A text-writer, in referring to the kind of mortgage thus in general use, remarks:

“The *mortuum vadium* was always made upon definite and exact terms of forfeiture; and if the conditions were not punctually kept, the title passes absolutely and forever from the debtor to the creditor. This form of landed security was extremely severe and often grossly unjust to the debtor. The spirit of the common law was inexorable, and allowed no redress to the unfortunate debtor”: 1 Wiltsie, Mort. Foreclosure (3 ed.), § 2.

In order to mitigate the severity of such a harsh rule, courts of equity interposed and by comparing the value of the tenements with the sum loaned, if it were determined that the land was of the greater worth, a reasonable time was allowed the mortgagor to recall the estate, which right thus granted was denominated “The equity of redemption”: 2 Black. Com. *159; Burton, Real Property, 481; 1 Greenleaf’s Cruise on Real Property, 547.

In a note at page 3 of Burton’s Real Property, in speaking of judges, the author observes:

“The true idea of the common law seems to be that of an organized system having its principles of growth within itself, and of which these officers are themselves a part. No new law can ever proceed from them; but the old is by their means in a continual process of further development.”

On the following page this text-writer asserts:

“The rules and usage of causes of equity form a system which may be regarded as a kind of secondary common law, applicable generally to matters in which the courts of law have no jurisdiction, but sometimes interfering with those courts, and correcting the law which they observe”: See, also, Wiltsie Mort. Foreclosure (3 ed.), § 216.

In speaking of the engrafting of equitable principles upon the severe rules of the common law regarding mortgages, a text-writer remarks:

"It is believed that the first encroachments by the courts of chancery were in the reign of Queen Elizabeth; but their powers were not fully exercised until the time of James I": Wiltsie, Mort. Foreclosure, § 2. To the same effect see Coote, Mort. *20; 4 Kent's Com. (11 ed.), *158.

3. Unless a custom had its origin "when the memory of man runneth not to the contrary," or from the beginning of the reign of Richard I, the rule was not sufficiently ancient to be classed as a part of the common law: 2 Black. Com. *31. The reign of Richard I began 369 years prior to that of Queen Elizabeth, so that the foreclosure of mortgages by granting an equity of redemption is not of common-law origin.

The principles of the common law which can be violated by the enactment of a statute must be a system of procedure which, from time immemorial, has been recognized in and enforced by courts of law, and since such maxims contained no provision relating to the foreclosure of a mortgage, our statutes on that subject are not violative of the ancient rules.

4, 5. While it is conformable to practice that statutes conferring special privileges on individuals should be construed strictly against them, it is also true that enactments for the redress of existing grievances and for the protection of rights are known as "remedial" and as such should be liberally interpreted: 36 Cyc. 1174. Legislation which protects alike all the members of a class that are or may be affected thereby is not obnoxious to Article I, Section 20, of the Constitution of Oregon: *In re Oberg*, 21 Or. 406 (28 Pac. 130, 14 L. R. A. 577). The remedial character of Section 426, L. O. L., which grants to a person the privilege of securing a tract of land for himself and family, by giving a mortgage upon the premises for a part of the

purchase price, limiting a recovery in case of a foreclosure to a sale of the land so purchased, and permitting the mortgagee to retain the sum of money received on account thereof, renders the statute subject to a liberal construction and makes it of greater importance to the state in securing home-builders, than the recognition of a rule which asserts that enactments conferring special privileges upon individuals should be strictly interpreted. Upon principle and authority Section 426, L. O. L., should be liberally construed in favor of the particular class of individuals there specified.

6. So interpreting the clauses of the statute under consideration they will be examined. It will be remembered that Section 422, L. O. L., substantially provides that a lien created by mortgage shall be foreclosed by a suit and the property adjudged to be sold to satisfy the debt secured thereby, and if it appears that a promissory note for the payment of the debt has been given by the mortgagor, the court shall decree a recovery of such debt against him, as in the case of an ordinary decree for the recovery of money. In foreclosing a mortgage in this state, the general practice has been, in a suit of this kind, to allege in the complaint that one or more of the defendants executed a promissory note to a person named, setting forth a copy of the instrument; that in order to secure the payment of such obligation the defendants also executed to the payee of the note a mortgage of real property describing the premises; that the mortgage provided that if the note were paid according to stipulation, the mortgage should be void, but if default in this respect were made the payee of the note or his assignee was authorized to foreclose the lien; that the plaintiff was the holder of the note, no payments on

account of which had been made except as stated, thus leaving due a certain amount; and that the conditions of the mortgage had thus been broken. 'The prayer of the bill was for a determination of the amount of the debt, and a foreclosure of the lien of the mortgage, that if upon a sale of the premises, the proceeds thereof were insufficient to satisfy the expenses of the sale, the costs and disbursements of the suit and the amount of such debt, that the plaintiff might have execution for the remainder. The decree invariably followed the prayer of the complaint, if its averments were substantiated.

"When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold": L. O. L., § 425, subd. 1.

"When the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases": Id., subd. 2.

Though the final process, issued pursuant to a decree of foreclosure, is thus denominated an "execution" against particular property, the practice in Oregon has been for the clerk in the first instance, to send forth, attested by his official seal and signature, what is known as "an order of sale," containing the title of the court and cause, addressed to the sheriff or other officer, commanding him in the name of the State of Oregon to enforce such mandate, which consists of a copy of the decree and an order to sell the property particularly described therein "as upon execution," and to apply the proceeds arising from the sale in the manner there specified. Where, after personal service of process, a decree was rendered against a de-

fendant, foreclosing a mortgage given to secure a promissory note, and the proceeds of the sale of the mortgaged property were insufficient to satisfy the debt, the procedure adopted in this state for the enforced collection of the remainder, after the return of the order of sale, has been to cause to be issued, without further leave of court, an execution as in ordinary cases. It will thus be seen that though our statute does not in express terms provide for giving a "deficiency judgment," such authority is impliedly conferred by Section 425, L. O. L., which prescribes the method to be pursued to collect the remainder after a sale of land upon the foreclosure of a mortgage securing the payment of a promissory note, and the general practice based upon that clause of the statute has been to incorporate in the decree an order which is equivalent to the rendering of such a judgment. Giving to Section 426, L. O. L., the liberal interpretation to which it is entitled as a remedial enactment, the language there employed is not only aimed at all other clauses of the statute relating to the foreclosure of liens upon property, but is also directed to the procedure heretofore prevailing in Oregon, which is authorized by the sections of the statutes referred to, that are in any manner inconsistent with the rule now prescribed for the foreclosure of a purchase-money mortgage, thereby impliedly amending the previous parts of the law contrary thereto. If that section of the statute is to be strictly construed, such interpretation would be equivalent to holding that the enactment made no alteration whatever in the prior statutes regulating the foreclosure of liens, or changed in any manner the procedure relating thereto, except to necessitate a suit to foreclose the mortgage, and in case of a deficiency upon a sale of the encumbered real prop-

erty, the maintenance of an action at law to recover such remainder, thereby entailing the costs and disbursements of two proceedings, when the expenses of only one was essential prior to the enactment of Section 426, L. O. L.

The decree demanded by Section 422, L. O. L., as modified by the subsequent enactment of Section 426, Id., requires a court of equity in foreclosing a purchase-money mortgage, given to secure the payment of a promissory note, to determine the entire sum due upon the personal obligation. Since, however, the latter section of the statute inhibits that court from granting "a deficiency judgment on account of such mortgage or note or obligation," a judicial ascertainment of the amount so due is not equivalent to the giving of a decree for the recovery thereof, except only as the award is limited to the real property described in the mortgage. A sale of the encumbered land under the decree foreclosing a purchase-money mortgage, necessarily exhausts the entire measure of power bestowed by the legislative assembly upon the court and there is therefore no remainder due, after the sale of the land, upon which an execution can be issued.

7. The amendment of Section 3, Article VII, of the Constitution of Oregon was adopted to facilitate the ultimate disposal of causes upon appeal, thus preventing the costs and disbursements which may be incurred by another trial. When, therefore, as in this instance, an execution cannot be legally issued upon a decree foreclosing a purchase money mortgage, or any other determination necessarily follows from the conclusion reached, it is the duty of the court so to announce the law in order to curtail expenses and to promote the peace of society.

8. It is a fact of which courts in Oregon should take judicial notice, that in the year 1897 and for some time thereafter, great financial depression prevailed in the Pacific Coast states. Persons who had purchased real property in that territory during the earlier flush times by paying a part of the purchase price and giving a mortgage to secure the remainder, found it impossible, if they had not disposed of the premises prior to the monetary stagnation, to discharge their legal obligations, whereupon the foreclosure of liens became inevitable. As there was no money then easily to be secured, the creditor, upon a sale of the premises pursuant to the decree, usually became the purchaser for almost a nominal sum and far below the mortgage debt, thereby obtaining a recovery over upon the personal obligation of the mortgagor for the remainder, thus taking all the property the debtor then had and jeopardizing his prospects of ever obtaining any more land. In order to prevent a repetition of such conduct on the part of a creditor, Section 426, L. O. L., was enacted and made applicable to the foreclosure of mortgages thereafter executed. That such a statute was intended to be remedial cannot well be disputed. The enactment is in the nature of an appraisement law, fixing an upset price upon the sale of real property under a decree of foreclosure equal to the amount of the debt, costs, disbursements, etc., thereby permitting the mortgagee to retain the sum of money which he had received on account of the sale, and allowing him to be restored to his original estate in the premises.

It will be admitted that in some instances the mortgagee might practically be at the mercy of the mortgagor. Thus, if buildings upon the premises were burned, the land, particularly a city or village lot,

might be inadequate security. Partial indemnity, however, might be obtained in such a case by stipulation, whereby the mortgagee could keep the structures insured for his benefit at the expense of the mortgagor, the premiums to be added to the lien and if the sum given for the insurance were not promptly paid a foreclosure of the lien might be decreed.

In case of the purchase in this state of timber lands, the chief value of which depends upon the number and quality of sawlogs that can be cut and removed from the premises, the purchaser of such real property, by giving a mortgage thereof to secure a part of the consideration, might by his carelessness suffer a fire to destroy the growth upon the land, thereby rendering the security practically valueless, and for indemnity in such a case present insurance is not obtainable. The consequences adverted to might well appeal to the law-making power, but they cannot be considered by a court except possibly to determine the legislative intent as a means of construing a statute. Similar questions are commented upon in the case of *Dennis v. Moses*, 18 Wash. 537 (52 Pac. 333, 40 L. R. A. 302), where it was held that a statute of Washington providing:

“That in all proceedings for the foreclosure of mortgages hereafter executed, or on judgments rendered upon the debt thereby secured, the mortgagee or assignee shall be limited to the property included in the mortgage,”

—was violative of the Constitution of that state, on the ground that it was an undue restraint upon the liberty of the citizen to contract with respect to his property rights. In that case the mortgage contained stipulation on the part of the mortgagor waiving all benefits under the provisions of the enactment. The lower court found that a writing to that effect had

been made, but that the attempted agreement was void; that there should be an appraisal of the land as demanded by the statute; and that the premises could not be sold for less than 80 per cent of such estimated value. The Supreme Court determined, however, that as the privilege undertaken to be bestowed by the statute upon a mortgagor was personal, in which the public had no interest, he could waive all such benefits. The general conclusion thus reached, however, is very much impaired by the dissenting opinion of two justices of the court.

The decision of the majority of the court in that case is not in harmony with the early rule adopted to prevent parties from avoiding beneficent redemption on the foreclosure of a mortgage, in speaking of which an author observes:

“No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably, the rule of law, *modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the courts of equity, to prevent this equitable jurisdiction being nullified by the artifice of the partes”: Coote, Morte. *21.

In *Bradley Engineering etc. Co. v. Muzzy*, 54 Wash. 227 (103 Pac. 37, 18 Ann. Cas. 1072), it was held that a decree foreclosing a chattel mortgage without giving a deficiency judgment, as required by the Washington statute, was *res judicata* as to the plaintiffs' right of recovery, and it could not afterwards bring a separate action for the deficiency, but its only remedy was to

appeal from the decree of foreclosure to correct the omission therein. In Oregon, though the statute does not expressly provide for the giving of a deficiency judgment upon the foreclosure of a mortgage, the practice in courts of equity in this state, authorized by Section 425, L. O. L., has been so universal to that effect as to acquire the force of a direct legislative enactment respecting procedure, and this being so the decision rendered in the case last cited is controlling herein, thereby making the decree given in *Wright v. Wimberly*, 79 Or. 626 (156 Pac. 257), prohibitive of the maintenance of this action.

It follows from the conclusions reached in the foregoing opinion that the decree of the Circuit Court should be affirmed.

AFFIRMED

BEAN, J., concurs.

BENNETT, J., Specially Concurring.—The facts in this case have already been fully stated in the opinion of Chief Justice McBRIDE and in the opinions of Justices BURNETT and HARRIS.

I concur in the conclusion and in the general reasoning of former Justice MOORE, as adopted in the opinion of the Chief Justice.

It seems to me that Section 426, L. O. L., clearly intended to make the foreclosure of the purchase-money mortgage satisfy the debt, without regard to the amount for which the property was sold, and that it was intended to prohibit a judgment for any deficiency, either in the foreclosure proceeding or any other proceeding.

I also think the title to the act, by which Section 426 was originally enacted, which was

“To abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance on the purchase price of real property,”

—was sufficiently broad to come within the provisions of Section 30, Article IV, of the Oregon Constitution.

I think the entire satisfaction of the debt and the prohibition of a deficiency judgment, either in the foreclosure proceeding or in an action at law, was “properly connected” within the meaning of that constitutional provision, with the subject indicated in the title.

It is urged that there was no deficiency judgment, under the provisions of our Code, prior to the adoption of Section 426, *supra*, and that, therefore, the act of the legislature abolishing deficiency judgments, found nothing to abolish, and was nugatory and meaningless. I think such a construction of a solemn act of the legislature should not be accepted, unless the argument therefor is very cogent and compelling.

It is reasoned that, according to the ancient practice, a judgment for the deficiency was a separate judgment, entered after the return of the execution upon the mortgage foreclosure, and that our judgment under Section 422, L. O. L., prior to the adoption of Section 426, was a general judgment against the defendant for the whole amount of the debt, and was not therefore a “deficiency judgment.”

It is argued that the phrase “deficiency judgment” should be defined as a special judgment for a fixed amount, entered after the return on the execution sale, after fixing the exact amount of the deficiency. It seems to me we should not place too much importance upon a mere arbitrary definition of the term. The practice, as to personal judgments for the deficiency on a mortgage foreclosure, has not been uniform in the different states for a great many years. In some states the old practice was preserved, and the personal judgments were not entered until after the mortgaged property had been sold and the proceeds applied

upon the debt. In others, a personal judgment was entered for the whole sum in the first instance, but execution against the defendant's property generally, could not be issued until it was specially ordered by the court; and this special order would only be made upon a showing, after the sale of the property covered by the mortgage. In still others, as in our own state, a personal judgment for the whole sum was entered at the time of the adoption of the foreclosure decree; but execution was suspended until the mortgaged property was sold, and then the amount received was applied upon the debt and execution issued as a matter of course for the balance remaining unpaid: 3 Jones on Mortgages (7 ed.), § 1709.

It seems to me that all of these are deficiency judgments, one as much as the other, since they all authorize a general execution against the defendants, for the deficiency after the mortgaged property had been sold and the money applied, and for that alone.

The words "deficiency judgment" have not, as far as I have been able to ascertain, ever attained the dignity of a dictionary definition. Neither do they seem to have been very often defined by the courts.

In *Goldsmith v. Brown*, 35 Barb. (N. Y.) 484, 492, there was a covenant to pay the deficiency after a foreclosure and sale, the court saying:

"This word 'deficiency,' as used in this contract, has a technical meaning, and signifies that part of the debt or sum of money which the mortgage was made to secure, and which is not realized and collected from the subject mortgaged."

In *Bailey v. Block*, 104 Tex. 101, 103 (134 S. W. 323, 325), the Supreme Court of Texas, after tracing all the different changes in the practice in regard to judgments for a deficiency, proceeds:

"To all of these practices one prominent requirement is common, and that is that the foreclosure sale is to be made, the proceeds applied and the deficiency thus mathematically ascertained before any proceeding against the property of the debtor other than that mortgaged, is allowed."

It seems to me that a deficiency judgment may fairly be defined as any judgment for the deficiency after the sale of the mortgaged property, and which can be enforced generally against the property of the defendant, after the receipts of the mortgage foreclosure have been applied.

And it seems to me that any such judgment would be equally a deficiency judgment, whether it was entered before or after the return of execution, and whether it was in form a general judgment for the whole sum, to be reduced by the application of the proceeds from the sale under the mortgage, or a specific judgment for the particular amount left unpaid, entered after the foreclosure sale.

It is true that under the law, as it stood prior to the adoption of Section 426, L. O. L., Section 422 of the Code provided that in addition to a decree of foreclosure the court should, in case of a promissory note, etc., "decree the recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money." That is still the law as to ordinary foreclosures other than purchase price mortgages.

But that section must be construed together with Section 425, which provides that an execution issue in the first instance, for the sale of the property covered by the mortgage, and that when the property covered by the mortgage is not sufficient to pay the entire debt,

"the decree may be enforced by execution as in ordinary cases."

This latter section is, of course, read into all personal judgments on the foreclosure of mortgages, and when the two sections are construed together, we have a judgment in form against the defendants for the whole sum, and also a judgment or decree for the sale of the mortgaged property; but the judgment against the defendants personally can only be enforced after the mortgaged property has been sold and then only for the amount of the deficiency.

To my mind, this is just as much a deficiency judgment as if the word "deficiency" was written into the decree, and that decree was entered after the sale of the property under the mortgage.

We think this is what has always been understood in this state as a deficiency judgment, and that it is the deficiency judgment prohibited by Section 426, L. O. L.

This view seems to be recognized by this court in *Stewart v. Templeton*, 55 Or. 364 (104 Pac. 978, 106 Pac. 640), in which it is said:

"It is insisted, however, that, whatever view may be taken, a deficiency judgment cannot be had against the defendant; but, since it is not disclosed that the notes were given for the purchase price of the property mortgaged, we fail to see upon what grounds this contention can be upheld."

In *Myer v. Beal*, 5 Or. 130, the court says

"The correct interpretation of this statute is, that when there is a covenant for the payment of a certain sum in the mortgage the remedy shall be against the land, and at the same time a personal judgment may be obtained to collect any amount which may remain unpaid after the proceeds of the sale of the mortgaged

premises have been applied to the extinguishment of the judgment."

It is true that under the doctrine announced in *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247), the holder of a purchase price note may still proceed at law upon the note and disregard the mortgage; but in doing so he waives his mortgage security, and I do not think that a court of equity would or ought to permit him to evade the statute by taking a personal judgment and then afterwards proceed in a court of equity to foreclose his mortgage.

I think it is a mistake to assume that he would receive the same advantages by proceeding at law on the note as he would by a foreclosure of the mortgage. It is true that he could have a general execution on his judgment against all of the property of the defendant, which might be levied upon the mortgaged property, the same as the remainder of defendant's property; but we may assume that the very purpose of taking a mortgage is to obviate some near or remote danger of the insolvency of the defendant. If it was certain that the debtor was solvent and would remain solvent no one would think of taking a mortgage. If a party proceeds on the note generally he may, when he gets his judgment and execution, find the property attached by other creditors; or a prior judgment of other creditors may have become a lien thereon; or the property may have been transferred or mortgaged by the debtor, or the debtor may claim it as a homestead exemption.

In nine cases out of ten, and probably in ninety-nine cases out of a hundred, the creditor would rather proceed on the mortgage, even if it extinguished his debt to do so, than to waive his mortgage and commence an

action at law upon the promissory note. It was no doubt the insolvent, or nearly insolvent, debtor the legislature was particularly trying to protect, and not the one who had plenty of means outside of the mortgaged property. It might be of but little advantage to the creditor to take a personal judgment over and above his mortgage against an insolvent or nearly insolvent debtor; and yet such a judgment might be a millstone hanging around the neck of such a debtor, discouraging thrift and industry, and leaving no room or hope for future prosperity.

It may be true, that if the mind of the legislature had been directed toward possible actions at law against a purchase price debtor upon the promissory note, that it would have prohibited such action also. The fact that it did not do so and did not complete a perfect scheme for the protection of the debtor under such circumstances, ought not to take away such relief and protection as has been given by the act.

Under the doctrine of *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247), the creditor still has his option to proceed on the mortgage to foreclose, or to proceed on the promissory note at law; but the legislature had a perfect right to say that he could not do both.

As to future contracts and in pursuance of what it considers a correct public policy the legislature has a right to prohibit any contracts which may be injurious to the general public good, or it may stop with rendering such contracts unenforceable. This has been too often held to be any longer questioned. The usury law prevents the contract of the parties for a greater than a given rate of interest. Again it is generally held that a party cannot make a contract in advance to waive his right of redemption or his privilege of ex-

emption. Hundreds of other illustrations could be cited but these are enough.

I think the statute should be literally construed in the interest of the purpose intended by the legislature. It is true that arguments can be adduced *pro* and *con*, as to whether or not such a law would be in the interest of a good public policy; but the very fact that there are such arguments both ways, and considerations to be weighed on each side, makes the question pre-eminently one for the legislature. And it having declared what it believes to be public policy, in regard to the matter, we must accept that as good public policy and liberally construe the law for the purpose of carrying out its intention

JOHNS, J., concurs.

HARRIS, J., Concurring.—L. Wimberly and Cora Wimberly purchased a tract of land from O. C. Jones; they paid a part of the purchase price and gave to Jones their promissory note for the balance and they secured the note by executing a mortgage on the land so purchased by them. The note was dated January 28, 1910, and was for the sum of \$3,000 payable on or before ten years after date with interest at 6 per cent per annum, payable annually. Neither the note nor the mortgage made reference to the fact that either paper represented a part of the purchase price of the land. Jones sold the note and mortgage to G. H. Carter who in turn transferred the instruments to the plaintiff A. H. Wright. The makers of the note failed to pay the interest which became due on January 28, 1914, and on that account A. H. Wright commenced a suit in foreclosure on March 1, 1914, making L. Wimberly, Cora Wimberly and other parties defendants.

That suit in foreclosure terminated on November 7, 1914, in a decree which in part, is as follows:

"It is ordered, considered, adjudged and decreed that the plaintiff have and recover off and from the defendants L. Wimberly, Cora Wimberly, O. C. Jones, G. H. Carter and each of them, the full sum of \$3,319.50 with interest from this 7th day of November, 1914, at the rate of six per cent per annum, and the further sum of \$300.00 attorney's fees, and plaintiff's costs and disbursements herein taxed at thirty-one (\$31.00) dollars; but that no deficiency judgment be entered against defendants L. Wimberly or Cora Wimberly."

On December 1, 1914, a writ of execution was issued on the decree commanding the sheriff to sell the mortgaged real property to satisfy the amount specified in the decree. The property was sold by the sheriff in obedience to the writ and the sum of \$2,500 was realized at the sale. The costs and disbursements of the suit and the attorney's fees were paid out of the proceeds of the sale and the remainder was applied on the amount due on the decree. Afterwards on June 23, 1916, A. H. Wright began this action against L. Wimberly and Cora Wimberly and demanded judgment against them for the sum of \$3,000, with interest from January 28, 1913, less the sum of \$1,909, which had been applied on the debt out of the proceeds derived from the sale of the mortgaged premises. The facts heretofore detailed as well as other facts were narrated in the complaint.

I concur in the conclusion that the judgment appealed from should be affirmed; but my conclusion is based upon reasons which are radically different from those given in the opinion approved by a majority of the court. We should remind ourselves at

the very outset of the discussion that Section 426, L. O. L., must be viewed in the light of the decision which was rendered in *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247); for it was there held that in despite of Section 426, L. O. L., the holder of a purchase note and mortgage can, if he wishes, ignore the mortgage, commence an action at law on the note, obtain a judgment against the maker for the amount due on the note and then by execution levy upon and sell any of the available property of the judgment debtor. In other words, under the ruling made in *Page v. Ford*, an action of law on the purchase money note can be prosecuted to a final judgment and full and complete payment of the judgment can be enforced precisely as any other money judgment can be enforced; for under the doctrine of that precedent Section 426, L. O. L., does not place any limitation whatever upon the judgment creditor, but upon the contrary he can compel full payment of the debt by levying upon both the mortgaged property and any other property which the judgment debtor may own exactly as in the case of an ordinary judgment. The ruling in *Page v. Ford* permits full payment by compulsory process if the holder of the purchase money note ignores the mortgage and sues on the note. The defendants argue that if the holder of the note and mortgage declines to ignore the mortgage and if he prosecutes a foreclosure suit, he is in that event limited to the mortgaged property and cannot compel the payment of any deficiency, remaining after the sale of the mortgaged property, either in the foreclosure suit or in any other proceeding.

Section 426, L. O. L., was enacted in 1903. The statute is entitled:

“AN ACT

“To abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance on the purchase price of real property”: Laws 1903, p. 252.

This statute will first be considered in the light of the words found in it and of the language employed in certain sections of the Code which were in force when the act of 1903 was adopted. The question of the intention of the legislature will be discussed later.

Every section of the Code, except Section 426, to which we shall direct attention was adopted as a part of the Civil Code in 1862; and it will be seen from an examination of the Code that at no time since 1862 has there been a statute permitting a deficiency judgment. Section 422, L. O. L., reads as follows:

“A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money.”

By the express terms of Section 422, L. O. L., a suit on a note and mortgage results in a decree: (1) Foreclosing the lien of the mortgage and directing a sale of the mortgaged property “to satisfy the debt secured thereby”; and (2) adjudging “a recovery of *the amount of such debt* against” the debtor, whether such debtor be the mortgagor or any other person. In brief, the statute plainly directs the court to decree

a foreclosure of the lien and also commands that "the court shall" enter a personal decree against the debtor for the amount of the debt. The decree against the debtor is not for a part of the debt, but it must be for the whole amount of the indebtedness, and it must be "as in the case of an ordinary decree for the recovery of money." We now turn to Sections 196 and 413, L. O. L., for the purpose of acquainting ourselves with "an ordinary decree for the recovery of money." Section 196, L. O. L., directs that all judgments shall be entered by the clerk in the journal "and shall specify clearly the amount to be recovered." Section 413, L. O. L., makes Section 196, L. O. L., applicable to suits in equity. By force of the plain terms of Section 196, L. O. L., an ordinary decree for the recovery of money would specify the amount to be recovered; and since under the provisions of Section 422, L. O. L., the amount to be recovered is the whole amount of the debt, it necessarily and inevitably follows that the amount to be specified in the decree, is the full amount due on the note. This personal decree is a full and complete decree for the amount of the debt. The note is merged in the personal decree and the latter becomes a bar to another suit or action: 23 Cyc. 1110.

We turn to Section 425, L. O. L., and there read:

"When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold"; and "when the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, *the decree may be enforced by execution as in ordinary cases.*"

It will be observed that in all cases of foreclosure an execution is issued against the property adjudged to

be sold, and, if the proceeds of the sale are not sufficient to pay "*the decree*" which has already been entered against the person then that same decree may be enforced "by execution as in ordinary cases." We next inquire how decrees in ordinary cases are enforced by execution.

By the terms of Section 415, L. O. L., the provisions of Sections 213 to 220, L. O. L., inclusive, and Sections 227 to 258, L. O. L., inclusive, "apply to the enforcement of decree so far as the nature of the decree may require or admit of it."

Title III of the Code includes Sections 213 to 253, L. O. L., inclusive and regulates "the enforcement of judgments in civil actions" by making ample provision for executions, levy and sale under execution, and redemption. Section 213, L. O. L., declares that—

"The party in whose favor a judgment is given, which requires the payment of money * * may at any time after the entry thereof have a writ of execution issued for its enforcement."

There are three kinds of executions, one of which is against the property of the judgment debtor: Section 214, L. O. L. "The writ of execution shall be issued by the clerk and directed to the sheriff," and "it shall require the sheriff to satisfy the judgment, with interest, out of" the property of the judgment debtor: Section 215, L. O. L. The writ of execution shall be returnable, within 60 days, after its receipt by the sheriff, "to the clerk's office from whence it issued." The writ is executed by the sheriff who "shall levy on the property of the judgment debtor sufficient to satisfy the judgment," and when property has been sold "he shall pay the proceeds thereof, or sufficient to satisfy the judgment, to the clerk by the day which the writ is returnable": Section 233, subds. 3 and 5. The notice

of sale, and the time, place and manner of sale are all regulated by statute: Sections 237 and 238, L. O. L. When real property is sold the sale is subject to confirmation by the court, but the judgment creditor "*shall be entitled*" to an order of confirmation unless objections are filed; and even though objections are filed and sustained the court "*shall * * direct that the property be resold*, in whole or in part, as the case may be, as upon an execution received of that date." The sheriff pays the proceeds of sale to the clerk and he in turn "shall then apply the same" on the judgment: Section 241, L. O. L.

When a decree is given in a suit, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given: Section 413, L. O. L. It is provided in Section 205, L. O. L., that immediately after the entry of a judgment in any action, the clerk shall docket the same in the judgment docket; and from the date of docketing a judgment it shall be a lien upon all the real property of the defendant within the county where the judgment is docketed during the time an execution may issue thereon. The provisions of Section 205 are made applicable to suits by the express terms of Section 413, L. O. L.

It must be remembered that the purpose of the act of 1903 (Section 426, L. O. L.), as declared in its title, is to abolish deficiency judgments; and, hence, if the procedure established by our Code neither provided for nor contemplated a deficiency judgment, then the act of 1903 accomplished nothing. The words "deficiency judgment" have a well-understood meaning when used in connection with mortgage foreclosures, for their genesis is not shrouded in doubt; and consequently when the legislature spoke of "deficiency judgments" we have a right to assume that the words

are to be accorded their generally accepted meaning. In one of its earliest forms a mortgage was made upon definite terms of forfeiture; and if the covenants were not strictly kept the title passed absolutely to the creditor, for the common law offered no redress whatever to the debtor. The severity of the common-law rule was alleviated upon the appearance of courts of equity, and in course of time the common-law courts waived their former exclusive jurisdiction and courts of equity assumed complete jurisdiction over mortgages; the "equity of redemption" finally became a definite right in every mortgagor; and no mortgage could be enforced without a decree of the chancellor: 1 Wiltsie on Mortgage Foreclosure (3 ed.), § 2. A suit for the foreclosure of a mortgage was in the nature of a proceeding *in rem*: 1 Wiltsie on Mortgage Foreclosure (3 ed.), § 8; 3 Jones on Mortgages (7 ed.), § 1711; its sole purpose was to enforce a charge on property; and the remedy was and is purely equitable: 1 Pom. Eq. Jur. (3 ed.), § 171; 4 Pom. Eq. Jur. (3 ed.), § 1413. Indeed, there was a time in the history of the law of mortgages when the sole remedy available to a mortgagee was a proceeding *in rem* against the land; but with the development of the law of mortgages and the establishment of the principle that a mortgage was only a security, bonds and notes came into use in connection with mortgages, or sometimes instead of using a bond a covenant to pay the debt was incorporated in the mortgage: 1 Wiltsie on Mortgage Foreclosure (3 ed.), §§ 215, 216; and hence the use of bonds and notes and covenants introduced a personal obligation into the transaction.

From the time when equity jurisprudence was first established courts of equity avowed and usually exercised the right to terminate litigation by settling the

whole controversy and awarding full and final relief to the litigants; and hence one might reasonably expect to find courts of equity exemplifying the fundamental conception of equity jurisprudence by awarding a judgment on the personal obligation and decreeing a foreclosure of the mortgage in a single proceeding. A suit to foreclose a realty mortgage, however, furnished an exception to this general rule, for it was held that the jurisdiction of a court of equity was confined to the mortgage itself and the litigant was therefore relegated to a law court for the enforcement of his legal right arising out of the note or bond or covenant. The suit on the mortgage was a proceeding *in rem* while the action on the note or bond or covenant was *in personam*. The equity of redemption, the interest of the mortgagor in the land, was equitable in its nature and foreclosable only in a court of equity; but the obligation of the mortgagor to pay the debt was purely legal and cognizable only in a court of law. The mortgagee could exhaust his right on the mortgage and if after applying on the debt the mortgaged property or the proceeds derived from a sale of the mortgaged property a deficiency existed the mortgagee could commence and prosecute an action *in personam* in a law court for the deficiency; and hence when we speak of a deficiency judgment we mean a judgment for whatever of the debt remains unpaid after applying the proceeds of the mortgaged property. The utmost power exercisable by a court of equity was—not to render a personal judgment—but to ascertain the amount of the indebtedness and decree a sale of the mortgaged property. In order, therefore, to enlarge the jurisdiction of courts of equity and to enable them to settle the legal as well as the equitable rights of the parties in a single proceeding in

conformity with a fundamental principle of equity jurisprudence, statutes have been enacted conferring upon courts of equity power to award judgments for any deficiency remaining after a sale of the mortgaged realty; and this power of a court of equity to render a deficiency judgment does not exist in the absence of statutory authority: *Noonan v. Lee*, 2 Black, 499, 509 (17 L. Ed. 278); *Orchard v. Hughes*, 1 Wall. 73, 77 (17 L. Ed. 560, see also, Rose's U. S. Notes); *January v. January*, 7 T. B. Mon. (Ky.) 542 (18 Am. Dec. 211); *Cobb v. Duke*, 36 Miss. 60 (72 Am. Dec. 157); *Frank v. Davis*, 135 N. Y. 275 (31 N. E. 1100, 17 L. R. A. 306); *Anderson v. Pilgrim*, 30 S. C. 499 (9 S. E. 587, 14 Am. St. Rep. 917, 4 L. R. A. 205); 2 Wiltsie on Mortgage Foreclosure (3 ed.), §§ 733, 737. It must not be understood that the mortgagee was obliged to resort to his remedy on the mortgage before commencing an action on the note or bond; for the mortgagee could if he wished pursue both remedies concurrently: *Colby v. McClintock*, 68 N. H. 176 (40 Atl. 397, 73 Am. St. Rep. 557); 1 Wiltsie on Mortgage Foreclosure (3 ed.), § 11; 19 R. C. L. 512.

Statutes providing for deficiency judgments are by no means uniform in their provisions, but the general result is that in a proceeding to foreclose a mortgage a judgment against the mortgagor may be rendered for any residue of the debt remaining unsatisfied after applying the proceeds derived from the sale of the mortgaged property. Usually a judgment for a deficiency is allowed only after a sale has been completed and the exact amount of the deficiency ascertained: 3 Jones on Mortgages (7 ed.), § 1709a; *Crisman v. Lanterman*, 149 Cal. 647 (87 Pac. 89, 117 Am. St. Rep. 167, 171); *Parmelee v. Schroeder*, 61 Neb. 553 (85 N. W. 562, 87 Am. St. Rep. 466). The territorial

Code which became effective on May 1, 1854, contained a section providing for a pure deficiency judgment; and this section of the territorial Code continued to be the law of this jurisdiction until the adoption of the Civil Code in 1862: State Const., Art. XVIII, § 7. The territorial Code is found in the Laws of 1853 and a reprint appears in the Laws of 1855. The section governing mortgage foreclosures reads as follows:

“When a bill shall be filed for the foreclosure or satisfaction of a mortgage, the court shall have power not only to decree and compel the delivery of the possession of the premises to the purchaser thereof, but, on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law; and for that purpose, may issue the necessary executions, as in other cases, against other property of the mortgagor”: Laws 1853, p. 181, § 57; Laws 1855, p. 203, § 57.

When construing Section 422, L. O. L., we must remember that the territorial Code provided for a genuine deficiency judgment and hence we are entitled to presume that Section 422, L. O. L., was adopted by the legislature with knowledge of the prior statute and for the purpose of effecting whatever changes may have been wrought by Section 422, L. O. L., 36 Cyc. 1146; and, moreover, this presumption is rendered especially emphatic when we are reminded that the sections of the territorial Code which provided for the procedure in actions at law and suits in equity were prepared by James K. Kelly who was one of the three commissioners selected to prepare the territorial Code and was also one of the three commissioners who

framed the Civil Code of 1862: 4 Oregon Historical Society Quarterly, 185.

It must be understood, throughout the discussion, that no attempt is here made to decide whether or not a mortgagee can foreclose a mortgage by a pure proceeding *in rem*, without asking for a personal decree for the amount of the debt: See *Eubanks v. Leveridge*, 4 Sawy. 274, 278 (Fed. Cas. No. 4544). In some jurisdictions the statute provides that a personal judgment may be rendered conditionally at the time of decreeing a foreclosure or absolutely after the sale and ascertainment of the balance due: *Springer v. Law*, 185 Ill. 542 (57 N. E. 435, 76 Am. St. Rep. 57). In some states the plaintiff is not entitled to an execution for a deficiency unless he obtains permission of the court after having applied to the court for permission upon notice to the defendant: 3 Jones on Mortgages (7 ed.), § 1709a.

Generally a judgment for a deficiency cannot be docketed until after the ascertainment of the amount of the deficiency, and usually a personal decree for a deficiency does not have the force and effect of a judgment at law and become a lien upon the real property of the debtor until the excess of the debt over the proceeds derived from a sale of the mortgaged realty has been ascertained and a subsequent judgment docketed: 2 Wiltsie on Mortgage Foreclosure (3 ed.), §§ 754, 755; 3 Jones on Mortgages (7 ed.), § 1720.

The manifest purpose of Section 422, L. O. L., was to simplify the procedure by permitting a recovery on the debt and a foreclosure of the mortgage in a single proceeding in which could be rendered a single decree covering both the note and mortgage. We should view Section 422 with reference to the statute which was in force prior to 1862; and it must be re-

membered that such prior statute provided for pure deficiency judgments and that Section 422, L. O. L., changed the procedure by eliminating deficiency judgments. The territorial Code permitted deficiency judgments, but the Civil Code abolished them by providing for a complete and unconditional judgment; and therefore when in 1903 the legislature enacted what has since been codified as Section 426, L. O. L., it did nothing more than to declare that the holder of a purchase price note and mortgage could not have what the legislature had already said he could not have, because provision had been made for an absolute, full and complete judgment, rather than a deficiency judgment. Section 426, L. O. L., was framed on the assumption that a deficiency judgment could be obtained, but that assumption was unwarranted. There was no such thing as a deficiency judgment in this jurisdiction. To say that Section 426, L. O. L., abolishes deficiency judgments is to say that it abolishes what had already been abolished; but to say that a holder of a purchase price note and mortgage cannot have a decree for the recovery of money as provided for by Section 422, L. O. L., or that he cannot have an execution for the enforcement of that decree as permitted by Sections 213 and 425, L. O. L., is, in the opinion of the writer, to legislate judicially by saying that Section 426 contains language not found there. Section 426 does not say that a personal decree shall not be entered and it does not say that an execution shall not issue on the personal decree. It necessarily and inevitably follows that a personal decree shall be entered in obedience to the express command of Section 422, L. O. L., and that an execution must be issued whenever called for by the judgment creditor under the provisions of Sections 213 and 425, L. O. L.

Inasmuch as the power of a court of equity to render a personal decree for money in a foreclosure proceeding is statutory, we must look to our own statutes not only for the manner in which the power shall be exercised but also for the results which flow from its exercise. If we again turn to the provisions of our Code it will be seen that a personal decree rendered in the foreclosure of a real estate mortgage is in every particular exactly like any other personal decree in a suit or judgment in an action and is accompanied with all the incidents which attend any other decree or judgment for money, with the single exception that the mortgaged land must be sold before an execution can be issued against other property owned by the debtor. When the decree of foreclosure is rendered the court "shall" award a personal decree for the whole amount of the debt. This is the one and only personal decree which the court is allowed to make. The clerk must enter this decree in the journal just as he must enter any other personal decree; he must docket this personal decree the same as he docket any other personal decree and when docketed this decree is a lien on all the real property owned by the debtor within the county. It is true that the law requires that the mortgaged property shall be sold first, but it is also true that the proceeds of sale are then applied on the personal decree which has been rendered for the whole amount of the debt; and if the amount of the personal decree exceeds the amount of the proceeds of the sale, the creditor is entitled to enforce payment of "the decree by execution as in ordinary cases"; and the issuance of this writ of execution is not a judicial function, but it is a purely ministerial act. The law and not the court determines the kind of execution to be issued. Leave of the court is not necessary, but the writ of exe-

cution, prescribed by the law, must be issued when the creditor requests it: *Banning v. Ray*, 47 Or. 119 (82 Pac. 708, 114 Am. St. Rep. 908); *In re Barker*, 83 Or. 702, 710 (164 Pac. 382); *Lane v. Ball*, 83 Or. 404, 428 (160 Pac. 144, 163 Pac. 975). It must be borne in mind too, that—

“The proceedings sanctioned by statute with reference to the confirmation of the sale relate to the title of the property and cannot be confounded with those agencies that work an extinguishment of the judgment”: *Vaughan v. Canby Canal Co.*, 68 Or. 566, 568 (137 Pac. 784, 785).

The fact that the Code requires that, when a personal decree for money is entered in a foreclosure suit, the mortgaged premises must be sold and the proceeds applied on the decree before execution can be issued against other property owned by the debtor does not make the personal decree conditional in any respect whatever. The decree, to the extent that it provides for the recovery of money, is absolute and unconditional and as much so as an ordinary money judgment rendered in an action at law. All persons will no doubt concede that a money judgment obtained in an action at law is absolute and unconditional; and yet when the holder of that money judgment attempts to compel payment by a writ of execution he must obey the mandate of Section 215, L. O. L., and

“satisfy the judgment, with interest, out of the personal property of such debtor”;

but, of course, if sufficient personal property cannot be found the creditor can then look to the real property of the debtor. Now, it is manifest that the fact that the law requires the mortgaged premises to be applied on a personal decree in a foreclosure suit before other property can be levied upon and sold does

not make such personal decree conditional any more than does the fact that the law requires the personal property of the debtor to be applied on an ordinary money judgment, obtained in an action at law, before the real property of the debtor can be levied upon and sold, make such money judgment conditional. The money judgment in an action at law is absolute and unconditional; and so, too, a personal decree in a foreclosure suit is absolute and unconditional.

In brief, at no time since 1862 have we had in this jurisdiction such a thing as a deficiency judgment or a judgment in the nature of a deficiency judgment. It is of no avail to say that it has been the practice, general or otherwise, of members of the profession to ask for and of trial courts to enter deficiency judgments; for the Code is the law and must prevail. It may be conceded that it is the duty of the court so to construe the statute as to give it effect if it can be done without resorting to judicial legislation; but it is impossible to give any effect to the act of 1903 without resorting to judicial legislation. The statute does not say that no personal decree shall be rendered at all; but it plainly contemplates that some sort of a personal decree shall be entered and the only decree provided for is the one specified in Section 422, L. O. L., and that decree so provided for is an absolute and unconditional decree for the full amount of the debt and is unhampered by any limitations whatsoever, except the single limitation that the mortgaged property shall constitute a primary fund for the payment of the decree. This limitation does not affect the character or form or amount of the decree itself, but it only fixes the order in which certain property shall be sold in satisfaction of the personal decree. To say that the act is to be construed to mean that an execution shall

not issue as provided for in Sections 213, 215 and 425, L. O. L., is to introduce into Section 426, L. O. L., words which cannot be found there. It was ruled, as already stated, in *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247), that the language of Section 426, L. O. L., did not prevent the holder of a purchase price note, which was secured by a real estate mortgage, from waiving the mortgage and prosecuting an action on the note to a judgment for the full amount of the debt; and, hence, if by resorting to judicial legislation language not found in Section 426 can nevertheless be injected into it so as to enable the court to say that Section 426 means that if a mortgagee brings a suit in equity to foreclose a mortgage he can only look to the mortgaged realty for payment of the debt, then we shall have a situation presenting two possible alternatives; one where the holder of the note and mortgage can waive the mortgage, sue on the note, obtain a judgment, enforce payment of that judgment in full by levying upon and selling the real estate which has been mortgaged as well as any other property not exempt from execution; and the other where the holder of the note and mortgage can maintain a suit to foreclose the mortgage but under penalty of being confined to the mortgaged property for payment of the debt.

The conditions which prompted the adoption of the act of 1903 are well known to all. Many tracts of land had been sold when the realty market was active for more than the land was really worth, the purchaser making a partial but substantial payment on the purchase price and giving his note and a mortgage on the land for the remainder, with the result that when real estate values slumped, many purchasers found themselves unable to pay their maturing debts and conse-

quent mortgage foreclosures ended with the mortgagees retaining initial payments, reacquiring the lands and not infrequently holding judgments for a part of the purchase price of the land. This was the evil which the act of 1903 was designed to remedy; and consequently when we read the act in the light of the motive which prompted its passage: Can it be said that the legislature intended to impose a penalty upon a suit to foreclose a mortgage by confining the mortgagee to the land for his pay, and at the same time leave him unhampered in the event he elected to waive the mortgage and prosecute an action at law on the note?

In *Page v. Ford* counsel for F. F. Williams and Floyd W. Williams, two of the defendants, contended in their printed brief that—

“It was clearly the intention of the legislature to limit the holder of the purchase money note and mortgage to the property itself”: 297 Or. Briefs (Part I), 144.

The same view is apparently entertained by counsel for the defendants here, for in their brief they state:

“We make bold to say that in our opinion the decision in *Page v. Ford* is not in harmony with the true spirit and intent of Section 426.”

If it were permissible and competent for the members of the legislature, who participated in the adoption of the act of 1903, to testify, their testimony or at least the testimony of most of them would be, precisely as is asserted in the two briefs just mentioned, that the real intention was to confine the holder of a purchase money note and mortgage to the mortgaged lands for the satisfaction of the debt and to prevent him from enforcing payment in any proceeding whatever, whether by a suit in foreclosure or an action at

law, out of any other property than the mortgaged lands. It is true that this intention may not be expressly manifested by the language of the statute. The statute was no doubt framed upon the mistaken theory that the Code provided for deficiency judgments and that the creditor could not ignore the mortgage and sue on the note, but that he would be obliged to prosecute a suit in foreclosure; and this erroneous view of the law evidently accounts for the language employed in the statute. And yet if the statute is read in the light of the evil which prompted its passage, it is just as reasonable, if not more so, to say that the purpose of the act was absolutely to confine the holder of the note and mortgage to the mortgaged land for his pay, as it is to say that the legislature intended that every suitor who enters a court of equity with a purchase money note and mortgage does so at the risk of losing part of the money justly due him, but if he enters a court of law he can have all the money justly due him. A suit in equity is only a form of procedure; an action at law is likewise a form of procedure. The legislature did not look upon a suit in equity as an evil and an action at law as a virtue, for each is only a form of procedure designed to accomplish a result.

Under the Code as it existed at the time of the adoption of the act of 1903 and as it was afterward construed in *Page v. Ford* the holder of the purchase money note and mortgage could sue in a court of equity, recover a personal decree for the full amount due on the note and he could collect that personal decree in full by levying upon and selling all the available property of the debtor, including the mortgaged premises; and so, too, the same creditor could, if he preferred, ignore the mortgage and prosecute an ac-

tion on the note in a court of law and recover a judgment for the full amount due on the note and then he could afterwards collect that judgment in full by levying upon and selling all the available property of the debtor, including the mortgaged premises. Now, the result was substantially the same whether the creditor made use of an action at law or a suit in equity. The result accomplished was the collection of the debt by applying upon it not only the mortgaged premises but also other property then owned or afterwards acquired by the debtor. The evil aimed against was furnished by the result produced by a proceeding for the collection of the debt whether such proceeding was an action at law or a suit in equity. If it was an evil to take more of the debtor's property than the mortgaged premises when suing in a court of equity it was just as much an evil to take more of the debtor's property than the mortgaged premises when suing in a court of law. If it is just and right to confine the creditor to the mortgaged premises and unjust to permit him to take additional property to satisfy the debt owing to him in a suit in equity it is likewise just and right to confine the creditor to the mortgaged premises and unjust to permit him to take additional property to satisfy the debt owing to him in an action at law. If, then, we view the statute in the light of the evil which it was designed to remedy: Is it reasonable to hold that the lawmakers intended to say to the holder of a purchase money note and mortgage—

“If you go into a court of equity and prosecute a suit in foreclosure you will be confined to the mortgaged land for your pay, even though the mortgaged land is not sufficient to pay the debt in full; while on the contrary if you ignore the mortgage and go into a court of law and sue on the note you are not confined

to the mortgaged property for your pay, but you can collect the debt in full, by taking, if necessary, all the property owned by the debtor, including the mortgaged property."

As already stated, the act of 1903 was no doubt framed upon the mistaken theory that the Code provided for deficiency judgments and that the holder of a note and mortgage had, under the then existing provisions of the Code, as his only remedy a suit in foreclosure and that he could not prosecute an action at law on the note; and hence we are justified in saying that this mistaken view accounts for the wording of the statute: The writer makes no attempt to dissent from the ruling in *Page v. Ford*, for he believes that the holding in that case was clearly right because, notwithstanding the real intention of the legislature, the court could not have carried out that intention without resorting to judicial legislation and writing into the statute words which were not written there by the legislature. If, on the other hand, it be assumed that the legislature intended to impose a penalty upon a creditor if he humbly submitted his claim to a court of conscience but to give him free rein if he boldly demanded his pay in a court of law, still, notwithstanding such assumed intention, it will be impossible to carry out that assumed intention without resorting to judicial legislation and arbitrarily saying that words appearing in the statute mean what they do not and cannot mean and by inserting words which the law-makers did not write in the statute, we are confronted with a statute which, if effective at all, is either completely effective or only partially effective. If it is completely effective it will confine the holder of a purchase-money note and mortgage to the mortgaged lands, whether he sues on the note and mortgage in a

court of equity or prosecutes an action on the note in a court of law. This construction would carry out what was in truth the intention of the framers of the statute; but such a construction cannot be given to the enactment without straining and distorting the words found in it, nor without resorting to judicial legislation, a function which the judiciary cannot rightfully exercise. If the statute is made partially effective it will confine the holder of the note and mortgage to the mortgaged lands only in the event he enters a court of equity and prosecutes a foreclosure suit to a final decree. This construction, however, cannot be given to the statute without likewise straining and distorting the words found in the enactment nor without resorting to judicial legislation; and, besides, this construction imposes a possible penalty upon every holder of a purchase money note and mortgage who enters a court of equity and does not impose a like penalty upon him if he enters a court of law, a result not contemplated or intended by the legislative mind. So long as the decision rendered in *Page v. Ford* stands as an authoritative precedent, Section 423, L. O. L., cannot apply to an action at law brought upon a purchase money note; and the statute ought not to be held to apply solely to a suit in foreclosure, especially when this construction cannot be given to the statute without judicial legislation, and when it is not in harmony with the real purpose of the legislature and when it imposes a possible penalty upon every person who enters a court of equity and does not subject the same person to the same or any penalty at all if he enters a court of law.

When the plaintiff prosecuted the foreclosure suit to a decree he was entitled to a personal decree for the full amount due and the note became merged in

that decree so that he could not afterward prosecute an action at law on the note. Indeed, the decree which was rendered adjudges that the plaintiff recover from the defendants the full amount due on the note and it therefore constitutes a personal decree for the entire amount of the debt. The recital in the decree: "that no deficiency judgment be entered against defendants" ought to be declared void and the decree given the same effect as any other decree for the payment of money. Having reduced the note and mortgage to a personal decree and the proceeds derived from the sale of the mortgaged premises not being sufficient to satisfy the decree, the plaintiff ought to be permitted to enforce payment as in the case of any other personal decree or judgment for the payment of money. The judgment should be affirmed.

BENSON, J., concurs.

BURNETT, J., Concurring Specially.—It was settled by the opinions in the former case that when the plaintiff bought a note secured by mortgage of even date therewith, he was charged with what knowledge he might have obtained by inquiry prompted by the contents of the public records to which his attention was directed by the fact that the mortgage was recorded and that he could not excuse himself under these circumstances for having failed to learn that the obligations covered part of the buying price of realty. The matter, therefore, about his having purchased in good faith and the like is not available in aid of his action. As to the attorney fee, the makers of the note promised to pay "such additional sum," which means but one attorney fee. It has been allowed in the foreclosure suit to recover on the note and the record dis-

closes that it has been paid out of the proceeds of the resulting sale. That portion of the obligation to pay, contingent though it was, has been fulfilled. Having thus liquidated the single sum promised in that behalf, the defendants are not liable to further exaction on that account.

We come now to the consideration of the demurrer to the complaint. The question presented for our decision is whether the foreclosure of a purchase-money mortgage exhausts all remedy which the plaintiff has for the collection of the debt represented by a promissory note given for such a liability and thus secured. Both parties appear to treat the decree in the foreclosure suit as having merely the legal effect to subject the land to the payment of the debt, the plaintiff contending that the application of the proceeds of sale under foreclosure, which were less than the amount of the claim, must be considered as so operating only *pro tanto*, while the defendants maintain that it worked out a full satisfaction of the debt. Without regard to the mere wording of the former decree, we will treat the question as presented by the parties and determine whether or not the holder of such a negotiable instrument is precluded by the former decree from collecting a deficiency remaining after the application of the proceeds of the sale towards the discharge of the debt. If nothing else appears the rule is that in a foreclosure suit a personal decree must be rendered against the maker or other person liable upon a promissory note or other personal obligation secured by the mortgage sought to be foreclosed: Section 422, L. O. L. This statutory precept has always been qualified by Section 429, L. O. L., reading thus:

“During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in

Section 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part."

A further modification was annexed by the act of February 24, 1903, Laws 1903, page 252, entitled "An act to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property," reading thus:

"When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same."

This statute was codified as Section 426, L. O. L.

Based upon the title, which exercises a controlling influence over the body of the act, it is plain that the enactment refers only to suits in equity and cannot affect other litigation which might theretofore have been lawfully employed for the collection of the debt. This is the doctrine of *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, 35 Ann. Cas. 1048, 45 L. R. A. (N. S.) 247). In that case it was decided in substance that notwithstanding a note was secured by mortgage on real property, the holder was not restricted exclusively to his remedy by foreclosure in equity but might maintain an action at law upon the note itself independent of the mortgage.

The effect of Section 429, L. O. L., is that if a mortgagee begins on the law side of the court he cannot,

during the pendency of the action nor thereafter until execution on his judgment has been returned unsatisfied in whole or in part, resort to equity. His right to relief in chancery is suspended until he exhausts his legal remedy. Correspondingly by Section 422, if he begins in equity he must work out that process to its end, and as by that section he obtains a personal decree for what is due on the promissory note or other personal obligation involved, there is no occasion for his going into the law court to obtain a judgment for what is lacking of complete satisfaction of his debt. The claim is merged in the personal decree and complete relief may be had on execution issued thereon. There cannot be two judgments for the same demand, in the same court, between the same parties.

The resultant of the varied legislative acts relating to debts secured by mortgage is further to separate the procedure at law from that in equity in litigation to recover the purchase price of realty, payment of which is secured not only by the direct personal promise of the debtor, but also by a collateral mortgage upon the land bought. As to that class of debts, its effect is confined to the procedure to realize upon them and does not alter the right of the buyer to agree to pay for the property a certain sum of money absolutely and at all events. Respecting purchase price liability, the concurrency of the remedies is restricted on one hand to the extent that if a judgment at law has been rendered, a foreclosure suit cannot be maintained until the law execution has been returned unsatisfied in whole or in part; while on the other, in such cases, the chancellor properly may not invade the province of the law court by rendering afterwards and in addition to the personal decree required by Section

422, L. O. L., a deficiency judgment upon which an execution, as at law, would issue as formerly for the satisfaction of a balance remaining after applying to the liquidation of the debt the proceeds of sales under execution issued on the original decree. In other words, the two remedies in such instances, the one by action at law on the note and the other by suit in equity for foreclosure, are made successive rather than strictly concurrent. The common-law rule that both proceedings may be carried on simultaneously is thus modified as to procedure, but the right ultimately to recover the entire debt is not impaired. That these statutes, being in derogation of the common law, must be strictly construed, is to follow a well-established canon of interpretation.

Besides all this, the title to the act of 1903 relating to deficiency judgments confines its operations to foreclosure suits. It makes no allusion to actions at law and does not pretend to restrict the theretofore established right to sue at law for the recovery of the debt. A deficiency judgment is one rendered in the foreclosure suit, but only after sale of the mortgaged realty has been effected and the proceeds found to be insufficient to discharge the debt secured: 1 Words and Phrases, Second Series, p. 1271; 3 Jones on Mortgages (7 ed.), § 1709a. Under Section 422, L. O. L., requiring in mandatory language that the court "shall also decree a recovery of the amount of such debt against such person" who gave a note or other personal obligation for the payment of the debt, there never can be a deficiency judgment in the true sense of the term. Suppose, after the return of the sheriff reporting the sale of the land under foreclosure, the plaintiff should apply to the equity court to render a judgment for

what was lacking of full satisfaction, the answer would be:

“You already have a personal decree for your whole debt; you cannot have another in the same suit; look to your execution for relief.”

Section 426, L. O. L., against deficiency judgments is only declaratory in negative form of what has always been the rule derived from the plain meaning of Section 422, L. O. L.

According to the writer's observation of the practice in this state under Section 422, extending over a period of more than forty years, the procedure is to take a personal decree for the debt evidenced by the note or other like obligation and an additional decree for the sale of the property and the application of the proceeds to the satisfaction of the debt. There is no occasion for inserting in the decree a clause granting an execution for the remainder. That follows by operation of law under the second subdivision of Section 425, L. O. L., reading thus:

“When the decree is against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree, as to the sum remaining unsatisfied the decree may be enforced by execution as in ordinary cases, * * .”

This is in consonance with Section 415, L. O. L., making the general statute on executions applicable to the enforcement of decrees so far as the nature of the decree may require or admit of it.

The two remedies, the one at law and the other in equity, are not inconsistent, but, on the contrary, supplement each other. While there can of course be but one satisfaction, neither remedy impairs the efficacy of the other to the end that the fulfillment of the law-

ful promise of the debtor to pay absolutely and at all events may be accomplished. If the term "waive" properly may be applied to the act of the creditor in commencing a suit instead of an action, or *vice versa*, it is only a temporary waiver in the light of the statutes and loses its force with the exhaustion of the remedy first chosen without full satisfaction of the debt.

The rule on that subject is thus enunciated in 19 B. C. L., page 509, Section 305:

"As a general rule, the taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. This is the settled rule at law. Therefore, a creditor holding a note secured by a mortgage may ignore his security and bring an action on the note. The promise to pay as evidenced by a promissory note is one distinct agreement, and, if couched in proper terms, is negotiable, while the pledge of real estate to secure that promise as evidenced by a mortgage is another distinct agreement which is not intended to affect in the least the promise to pay, but only to provide a remedy for the failure of performance."

The precept is thus taught in 27 Cyc. 1758:

"Where the proceeds of a foreclosure sale are not sufficient to satisfy the mortgage debt, and plaintiff did not recover a deficiency judgment in the foreclosure suit, or was prevented from doing so by want of authority in the court to grant it, want of jurisdiction over the defendant, or other cause, he may thereafter maintain an action at law against the person liable for such deficiency, basing his action either on the note or bond secured by the mortgage or on the foreclosure judgment, or simply on the indebtedness arising from

the foreclosure, and the failure of its proceeds to extinguish the original debt or claim."

It is clearly lawful for one to buy land from another and give his promissory note in payment of the whole or a part of the purchase price without executing any mortgage or other security in connection therewith. It is equally as competent for the buyer of such realty to give a mortgage upon it, so conditioned that it shall be void upon the payment of a certain sum of money, representing part of the purchase price, but without assuming any personal liability. Each contract, the one personal and the other by pledge, is lawful and is not inconsistent with the other. All that our statute has said is that if the creditor begins the exercise of either remedy, he must pursue it to exhaustion. In short, the legislation of this state has not gone to the extreme of saying that giving of collateral security by mortgage impairs the obligation voluntarily assumed by the debtor of paying absolutely and at all events the purchase price of realty. *Colby v. McClintock*, 68 N. H. 176 (40 Atl. 397, 73 Am. St. Rep. 557), and other like cases are precedents sustaining the right to use both remedies so far as necessary to collect the whole debt.

Even in states where it is provided that there shall be but one form of action for the foreclosure of a mortgage and the collection of a debt secured thereby, the practically universal holding is that the effect of such legislation is merely to require the creditor to exhaust the mortgage security before proceeding at law as he may properly do to recover any deficiency in the payment of the debt: *Boucofski v. Jacobsen*, 36 Utah, 165 (104 Pac. 117, 26 L. R. A. (N. S.) 898); *Clark v. Pad-dock*, 24 Idaho, 142 (132 Pac. 795, 46 L. R. A. (N. S.)

475); *Sacramento Bank v. Copsey*, 133 Cal. 663 (66 Pac. 8, 85 Am. St. Rep. 242); *Blumberg v. Birch*, 99 Cal. 416 (34 Pac. 102, 37 Am. St. Rep. 67); 2 Jones on Mortgages (7 ed.), §§ 1215, 1218, 1220-1222, 1227, 1228.

The legislative department of government by its enactments mentioned has not made the promissory note in question an unlawful contract. Neither has it stigmatized with illegality the mortgage to secure the same, and until it has done so those who voluntarily execute such contracts must comply with them according to their terms.

The argument is fallacious to the effect that Section 426, L. O. L., should be liberally construed in favor of those who would acquire homes and give mortgages for some, if not all, of the purchase price. The practical result of that doctrine would be to obstruct the acquisition of homes, for if it be understood that the would-be purchaser lawfully may repudiate his direct promise to pay the contract price absolutely and at all events, as evidenced by his promissory note, property owners will not deal with him. Taken in connection with the rule established in *Page v. Ford*, 65 Or. 450 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247), another consequence of the construction for which the opinion of the late Mr. Justice Moore contends, would be to drive mortgagees to the law side of the court in the first instance to recover judgment, with its attendant costs and expenses. This would not release the mortgage, and while it might delay, yet it would not preclude its foreclosure by a subsequent suit as allowed by Section 429, L. O. L., quoted above. Especially in cases where the debtor resides in one county and the mortgaged land is in another, judgment might be taken, an execution issued in the law action in the county of his residence and returned un-

satisfied, leaving the way open to the foreclosure in the other county at the additional expense, and burdening the debtor with two proceedings where one would answer the purpose. Such a result cannot be avoided without judicial legislation incorporating in the statute terms not included by the law-making power.

In the case at bar the Circuit Court had before it a complaint which discloses that the plaintiff already has a personal decree for the full amount of his debt, the unsatisfied portion of which can be collected by execution as in ordinary cases, by authority of Sections 415 and 425, L. O. L. No appeal from this decree seems to have been taken by the defendants. Right or wrong in the first instance, it is at this juncture valid because rendered by a competent tribunal having jurisdiction of the litigants and of the subject matter. The plaintiff's demand was merged in that decree both as against the debtors themselves and as against the mortgaged realty. He has no present cause of action on that claim. He could get nothing more by an additional judgment. The matter is *res judicata*. His remedy is by the issuance of an execution on that decree "as in ordinary cases." Hence the Circuit Court was right in sustaining the demurrer to the complaint and its decision should be affirmed.

Argued October 7, affirmed November 4, 1919.

ESTEP v. BAILEY.

(185 Pac. 227.)

Covenants—Conclusiveness of Judgment After Notice to Covenantor.

1. Where action on covenant against encumbrances was brought by grantee to recover amount of judgment he had been compelled to pay in action by owner of outstanding lease, of which action defendant grantors had been notified, and also to recover \$50 attorney's fees in the former action, the reasonableness of such fees not having been questioned in the former action, there was no necessity of submitting that part of the case to the jury; defendants' contention being that they were not liable therefor.

Covenants—Outstanding Lease as Breach of Covenant Against "Encumbrances."

2. The existence of a valid lease to another at the date of the warrantors' deed was a breach of their covenant against encumbrances, an "encumbrance" being a burden on the land which depreciates its value, as a lien, easement, or servitude.

Crops—Covenants—Right to Growing Crops on Failure to Reserve in Deed.

3. As between vendors and purchaser a deed to the property upon which a crop is growing conveys to the purchaser the growing crop as a part of the real property, unless the same is reserved by the vendors in the deed, and this is true even if the purchaser knew that there was an outstanding lease upon a portion of the premises at the time of purchase.

Landlord and Tenant—Right of Tenant to Crops as Against Landlord and His Grantee.

4. A tenant is entitled, as against the landlord and his successors, to the annual crops raised on the land during the tenancy, and as between them such crops are not a part of the freehold, but the property of the tenant, in the absence of contrary stipulation.

[As to title to or interest in crop, see note in 98 Am. St. Rep. 956.]

Covenants—Measure of Damages for Breach of Covenant Against Encumbrances.

5. Generally the measure of damages for breach of a covenant against encumbrances by reason of an outstanding lease is the value of the use of the premises during the remainder of the life of the lease.

Covenants—Recovery of Expenses Incurred in Defending Title.

6. Grantee in a warranty deed is entitled to expenses incurred in defending title against the claim of a third party.

Covenants—Damages from Breach of Covenant Against Encumbrances.

7. Where, at time of conveyance with covenant against encumbrances, there was an outstanding lease, the tenant under which had planted a crop, which the grantee thereafter harvested and sold, the grantee could recover from the grantors the amount of the judgment and costs secured against her in an action, of which warrantors were notified, by the tenant for the value of the crop so sold by the grantee.

Covenants—Conclusiveness of Judgment After Notice to Covenantor.

8. Grantee having notified defendant warrantors to defend an action brought by tenant under outstanding lease against grantee for conversion of crops not reserved in the deed, the vendors are bound by the judgment in that case to the same extent as though they had been parties to the record, and such judgment is conclusive upon them as to the existence and validity of the tenant's outstanding lease from the former owner, and as to the amount grantee was compelled to pay tenant in tenant's action for conversion of crops growing on the land at date of purchase.

Judgment—Conclusiveness on Party Notified to Defend.

9. Where a party against whom an ultimate liability is claimed is fairly and fully notified of the claim, and that the action is pending and given full opportunity to defend or to participate in the defense, if he then neglects or refuses to make any defense he may claim to have, the judgment will bind him in the same way and to the same extent as if he had been made party to the record.

Covenants—Liability to Covenantee for Attorney's Fees.

10. Where grantee in warranty deed was obliged to incur the expense of \$50 for attorney's fees in defending an action, of which her warrantor was notified, by tenant under a lease outstanding at the time of conveyance, for conversion by grantee of such tenant's crop then on the land she could recover for such expense from her warrantor.

Appeal and Error—Review of Rulings on Evidence Unnecessary.

11. In purchaser's action against vendor for breach of covenant against encumbrances where tenant, under an outstanding lease, had obtained a judgment against purchaser, it is unnecessary on appeal to determine the question in regard to the introduction of oral evidence as to what was said in relation to the crop at the time of negotiations for the sale.

From Washington: GEORGE R. BAGLEY, Judge.

Department 2.

This is an action for the breach of a covenant of warranty contained in a deed. Judgment was ren-

dered in favor of plaintiff from which defendants appeal.

The facts of the case are in effect as follows: On January 19, 1917, defendants J. W. Bailey and Grace S. Bailey, his wife, being the owners of lot 10 in Oak Park Subdivision of section 35, township 1 north, range 3 west of the Willamette Meridian in Washington County, Oregon, containing 10 acres, sold and conveyed the land to plaintiff L. C. Estep by a deed containing the following covenants:

"Said J. W. Bailey and Grace S. Bailey, grantors above named, do covenant to and with the said L. C. Estep, her heirs and assigns that they are the owners in fee simple of the above granted premises, and that they are free from all encumbrances, except a mortgage in favor of Daniel Deaville, given to secure a promissory note for \$400, dated July 16th, 1914, and due five years from date, which the grantee herein assumes and agrees to pay, and that they will, their heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, except as against said mortgage."

Defendants had purchased the lot a short time before the conveyance from Felix Cabella, who during the fall of 1916, had leased three acres thereof to D. P. Corrieri. The lessee, during the fall of 1916, planted a crop of wheat and vetch on the leased land which was growing at the time of the execution of the deed to plaintiff and which did not mature until the summer of 1917. The plaintiff immediately entered into possession of the property under her deed, and was afterward notified by Corrieri that he claimed to be the owner of the crop. Whereupon plaintiff by her husband F. S. Estep informed defendant J. W. Bailey of

the claim of Corrieri, and was told in effect not to worry over it; that he intended that plaintiff should have the crop, and that Corrieri could not make anything out of the case. Thereafter plaintiff harvested and sold the crop. After which Corrieri instituted an action against the Esteps to recover the value of the crop claimed under his lease. Plaintiff then duly notified the defendants of the action brought by Corrieri, and demanded that defendants appear in the action and defend the title to the property, or otherwise plaintiff would defend the action and expect reimbursement from defendants. The Baileys refused to comply with the notice. Plaintiff resisted the action, but Corrieri obtained a judgment against the Esteps for \$119.95 and \$38.20 costs.

Defendants objected and excepted to the introduction of the record in this action as evidence of the judgment in favor of Corrieri. At the close of plaintiff's evidence in chief, counsel for defendants moved the court for a judgment of nonsuit against plaintiff, which was denied. After the introduction of all the testimony in the case, counsel for defendants renewed the motion for a nonsuit, which was also overruled. Defendants' contention was that there was not sufficient evidence to take the case to the jury; that plaintiff had not introduced any evidence of the reasonable value of the use and occupation of the premises for the time lost by plaintiff by reason of the Corrieri lease. Defendants offered proof tending to show that the rental value of the three acres leased to Corrieri for the crop season of 1916 and 1917 was \$30. This evidence was rejected and an exception to the ruling was duly saved. Counsel for defendants requested instructions to the jury in accordance with their theory of the case. The trial court directed a verdict in favor of plaintiff holding

defendants bound by the judgment in the action instituted by Corrieri for damages for the conversion of his crops.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Thomas H. Tongue* and *Mr. H. T. Bagley*, with an oral argument by *Mr. Tongue*

For respondent there was a brief over the names of *Messrs. Hare, McAlear & Peters*, with an oral argument by *Mr. R. F. Peters*.

BEAN, J.—1. As plainly stated in appellants' brief: All the questions to be determined on this appeal cluster about and will necessarily be disposed of by the determination of the last-named point. The plaintiff in the case at bar in addition to the amount of the Corrieri judgment recovered \$50 for attorneys' fees in the former action. The reasonableness of this fee was not questioned in the former action, so there was no necessity for submitting that part of the case to the jury; the defendants' contention being that they were not liable therefor.

2. It is urged by counsel for defendants that the crops on a portion of the land were personal property owned by Corrieri, and no title thereto passed by the deed, and that the defendants are not liable under their covenant for the damages for the conversion of such crops by plaintiff. It is also contended by defendants that in any event the true measure of damages in the present case is the fair rental value of the land for the unexpired term of the lease. It appears that the lease from the former owner to Corrieri was not in writing, and that Mr. Bailey did not know of its existence while he owned the land. There was no reservation of the

crop in the deed to plaintiff. It is practically conceded in this case that the claim of Corrieri to the crop in the action therefor was based upon the outstanding lease from Cabella, the former owner of the premises.

"An 'encumbrance' is a burden on land which depreciates its value, as a lien, easement, or servitude, and includes 'any right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the conveyance of the title'": 2 Words and Phrases, Second Series, p. 1018.

See, also, *Friendly v. Ruff*, 61 Or. 42 (120 Pac. 745); Rawle on Covenants for Title (5 ed.), p. 90, § 75. An outstanding lease upon premises at the time of conveyance constitutes an encumbrance: 7 R. C. L. 1164; *Beutel v. American Machine Co.*, 144 Ky. 57 (137 S. W. 799, 35 L. R. A. (N. S.) 779).

The existence of a valid lease to Corrieri at the date of the deed from the defendants to the plaintiff was a breach of the covenant against encumbrances, quoted above, and entitled Mrs. Estep, the covenantee, to recover damages: 7 R. C. L., p. 1164, § 79.

3. According to the rule of the common law, growing crops pass with the title to the land on a conveyance thereof in fee, unless they are reserved by the vendor. This rule is based upon the principle that a deed is to be construed most strongly against the grantor, and if the crop is not reserved the grantor is presumed to have intended it to pass with the possession. If the rule were otherwise, a purchaser of land would be subject to the intrusion of the grantor to gather the crop, which, in the absence of a stipulation granting such privilege, would be a trespass, and there would be presented the situation of the ownership by one of personal property on the land of another without the

right to enter and take it: 8 R. C. L., p. 358, § 5; note to *Beutel v. American Machine Co.* (Ky.), 35 L. B. A. (N. S.) 779.

As between the Baileys, the vendors of the land and Mrs. Estep, the purchaser, a deed to the property upon which a crop was then growing would convey to the purchaser the growing crop as part of the real property, unless the same was reserved by the vendor in the deed: 8 R. C. L., p. 358, § 5; 12 Cyc. 977; *Jones v. Adams*, 37 Or. 473, 475 (59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766, 50 L. R. A. 388); 8 Am. & Eng. Ency. of Law (2 ed.), 303. This is true even if Mrs. Estep, the purchaser of the land knew that there was an outstanding lease upon a portion of the premises at the time she purchased: *Corbett v. Wrenn*, 25 Or. 305 (35 Pac. 658); *Clark v. Fisher*, 54 Kan. 403 (38 Pac. 493).

4-6. As between Corrieri and his landlord, Cabella, and his successors, Corrieri as a tenant was entitled to the annual crops raised on the leased land during the tenancy. As between them such crops are not part of the freehold, but are the property of the tenant in the absence of any stipulation affecting it: 8 R. C. L., p. 362, § 8; *Opperman v. Littlejohn*, 98 Miss. 636 (54 South. 77, 35 L. R. A. (N. S.) 707); *Colville v. Miles*, 127 N. Y. 159 (27 N. E. 809, 24 Am. St. Rep. 433, 12 L. R. A. 848); *Olin v. Martell*, 83 Vt. 130 (74 Atl. 1060, 138 Am. St. Rep. 1072). In the case of *Clark v. Fisher*, 54 Kan. 403 (38 Pac. 493), which is very much in point, as the facts were similar to the case at bar, the syllabus is as follows:

“When the premises conveyed by a deed from a grantee to a grantor with a covenant against encumbrances have a growing crop thereon at the delivery of the deed, belonging to a tenant of the grantor, and the grantee is deprived of the possession on account

of the unexpired term of the lease of the tenant, the value of the crop, less the cost and expense of the taking care of and the harvesting the same, may be considered in estimating the real injury to the grantee arising from being deprived of the possession of the premises until after the crop is harvested and taken away."

In *Newburn v. Lucas*, 126 Iowa, 85 (101 N. W. 730), it was held that in an action for breach of covenants of warranty in a deed, the deed governs and the grantor cannot defeat the covenants by parol evidence of the grantee's knowledge of an encumbrance; also that in an action on a covenant of warranty for damages sustained by reason of the grantor's vendor in possession of the premises at the time of the conveyance claiming the growing crops, the measure of damages is the value of the growing crops at the time of the conveyance. It seems that the measure of damages in the *Corrieri* case was taken to be the value of the crop less the expense of harvesting the same. In the absence of special circumstances, the general rule is that the measure of damages for the breach of a covenant by reason of an outstanding lease is the value of the use of the premises during the remainder of the life of the lease. A grantee in a deed like the one from defendants to plaintiff is entitled to expenses incurred in defending title against the claim of the third party: Note to *Beutel v. American Machine Co.* (Ky.), 35 L. R. A. (N. S.) 779; 15 C. J. 1332; *Balte v. Bedemiller*, 37 Or. 27, 33 (60 Pac. 601, 82 Am. St. Rep. 737); *Ellis v. Abbott*, 69 Or. 234, 240 (138 Pac. 488).

7. The crop of wheat and vetch was a part of the real estate sold and conveyed by defendants to plaintiff and the title to the grain should have passed by the deed to the plaintiff. The defendants covenanted

that they were the owners of the property including the crop. On account of the outstanding lease at the time of the conveyance, and in order for plaintiff to obtain the benefit of the fruit of the land which she had purchased, and to which she was entitled, and to remove the effect of the encumbrance, she was compelled to pay \$208.15. Therefore the plaintiff was actually damaged by reason of the breach of the covenant in that sum. The rental value of the three acres for the unexpired term of the lease from January, 1917, until the crop was removed would not be a fair compensation for plaintiff's damages as nearly one half of the time between the planting and harvesting of the crop had elapsed at the time of the purchase and conveyance. Plaintiff by reason of her purchase and deed was entitled to the benefit of the time that had elapsed, as well as to the result of the labor in preparing the land and planting the crop and the seed therefor. Therefore, under the peculiar circumstances of this case, the rental value rule could not well be applied. She was entitled to recover compensation for the injury resulting to her by reason of the breach of the warranty. The case comes within the exception to the rule where "special circumstances" exist. The underlying principle in cases of this character is that the damages should be estimated according to the real injury caused by the existence of the encumbrance. This would include compensation for trouble and expense caused plaintiff on account of such encumbrance: *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. 95); *Musial v. Kudlik*, 87 Conn. 164 (87 Atl. 551, Ann. Cas. 1914B, 1172); *Sarlls v. Beckman*, 59 Ind. App. 638 (104 N. W. 598).

8. The defendants having been notified to defend the action brought by Corrieri against the plaintiff being ultimately liable for the damages sustained by plain-

tiff by reason of the outstanding lease at the date of plaintiff's deed, are bound by the judgment in that case to the same extent as though they had been a party to the record. If the defendant desired to contest the case as to the amount of damages or as to the existence of the Corrieri lease, it was incumbent upon them when duly notified of the institution of this action to appear and defend. They having failed and refused to make such defense, the judgment in that case is conclusive upon them as to the following issues in the present case: First. That there was a valid existing and outstanding lease from Cabella, a former owner of the land, to Corrieri of three acres of the land conveying to plaintiff. Second. That by reason of the existence of such lease and the enforcement of Corrieri's right thereunder, the plaintiff, in order to protect her title and obtain the full enjoyment of the use and occupation of the land to which she was entitled under her deed, was compelled to pay the amount of the Corrieri judgment, \$158.15, and that plaintiff was thereby damaged in that sum: 15 R. C. L. 1020; *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538 (136 Pac. 645, 49 L. R. A. (N. S.) 404); *Corvallis etc. R. Co. v. Portland etc. Ry Co.*, 84 Or. 524, 542 (163 Pac. 1173).

9. The defendants having failed to make a defense in the Corrieri case after they were noticed to do so cannot now litigate the matters which were the subjects of controversy and adjudicated in the former action. Where a party against whom an ultimate liability is claimed is fairly and fully notified of the claim, and that the action is pending and given full opportunity to defend or to participate in the defense, if he then neglects or refuses to make any defense he may claim to have, the judgment will bind him in the same way and to the same extent as if he had been made party

to the record: *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663 (39 N. E. 360); *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316 (40 L. Ed. 712, 16 Sup. Ct. 564, see, also, Rose's U. S. Notes).

10, 11. The plaintiff being also obliged to incur the expense of \$50 for attorneys' fees in defending Corrieri action, the amount of which is not contested, is entitled to recover therefor. The judgment in the Corrieri action being binding upon the defendants, it is unnecessary for us to ascertain whether or not the exact rule as to damages was applied in that case, as the judgment therein has become final. It is also unnecessary to consider the question in regard to the introduction of oral evidence as to what was said in relation to the crop at the time of the negotiations between the plaintiff and defendants for the sale of the ten-acre tract, as the written covenant in the deed governs in the premises.

There was no error in the trial court holding that the defendants are bound by the judgment rendered against plaintiff in the action instituted by Corrieri for damages. The judgment of the lower court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ.,
concur.

Argued June 24, modified July 1, further modified on rehearing November 4, 1919.

GRABER v. BOSWELL

(181 Pac. 986; 185 Pac. 231.)

Mortgages—Future Advances—Sufficiency of Evidence.

1. In suit to foreclose a mortgage for future advances, evidence *held* insufficient to establish plaintiff's right to more than \$83.40 on an amount of \$250 claimed by plaintiff to have been paid by the original mortgagee, her deceased husband, as attorney for defendant mortgagor, for a metallic casket for the remains of defendant's husband.

Mortgages—Future Advances.

2. In suit by widow of attorney, who had acted for defendant widow of his friend, to foreclose a mortgage given by defendant to such attorney to secure advances, the attorney having filed a voucher against the estate for an amount of \$50 claimed to have been paid for exhuming and transporting the remains of defendant's husband for interment elsewhere, the additional charge of \$111 shown in his personal account against the widow, who insisted that even the \$50 charge is excessive, should be eliminated.

ON REHEARING.

Appeal and Error—Modification of Opinion.

3. In an action to foreclose a mortgage, where it appears that the note which the mortgage secured was given to cover future advances, the Supreme Court on appeal will consider the action as one for an accounting and dispose of the matter, where it is clear that no evidence other than that before the court could possibly be produced in another formal suit for an accounting.

Mortgages—Burden of Proof—Advances by Mortgagee.

4. In an action to foreclose a mortgage securing a note given to cover future advances, the burden of proof rests upon the plaintiff to establish the amount of money advanced to the defendant.

Mortgages—Evidence on Foreclosure—Items to be Considered.

5. In an action to foreclose a mortgage securing a note given to cover future advances, the fact that mortgagor shipped mineral water to the mortgagee must be disregarded, where there is no evidence as to the quantity of water shipped or its market value.

From Douglas: GEORGE F. SKIPWORTH, Judge.

Department 1.

This is a suit to foreclose a mortgage upon real estate. The complaint is in the usual form. The

note and mortgage were both executed in favor of Thomas F. Graber, who subsequently died, leaving a will naming his widow, the plaintiff herein, as his sole legatee.

The answer admits the execution of the instruments upon which the suit is based, but denies that they were executed for a valuable consideration, and then pleads affirmatively that defendant is the widow of Benjamin D. Boswell, who died May 19, 1907, and who for a long time prior to his death, was a client and close personal friend of Thomas F. Graber, who was a practicing attorney at law in Oakland, California; that Boswell, in his last will and testament had appointed Graber to be the executor thereof, but owing to the fact that Graber was a resident of California, he could not qualify as such executor, and the defendant was therefore appointed administratrix with the will annexed, of her husband's estate. She then retained Graber as her legal adviser in the administration of the estate, relying implicitly upon him faithfully and honestly to direct her therein, placing special confidence in him by reason of his intimate friendship for her deceased husband. She avers that Graber represented to her that it would be necessary for her to have some ready money wherewith to pay the debts of the estate, including a mortgage of \$700 due to the State Land Board of Oregon, and suggested \$1,000 as the sum necessary to be raised, but later induced her to execute the note and mortgage above mentioned, in the sum of \$2,000. She further asserts that he promised to protect her interests and that she would only be required to pay thereon such sums as should be thereafter actually advanced by him for such purposes; that thereafter, and prior to the final settlement of the

estate, the defendant, with the advice of Graber, sold a portion of the real estate for \$2,000, and this sum was used to pay the \$700 mortgage to the State Land Board, and all of the debts of the estate, including the expenses of administration, leaving a surplus after all debts were paid, and that all claims of said Graber against the estate or herself have been fully paid. It is further alleged that she has repeatedly sought to obtain a settlement and adjustment with Graber, but the same had always been postponed by him, and she has never succeeded in securing the same.

The reply admits the personal friendship and professional relations existing between Graber and Boswell, the allegations in regard to the appointment of defendant as administratrix of her husband's estate, the sale of certain real estate for \$2,000, and the employment of Graber as defendant's legal adviser, but denies generally all other allegations of the affirmative answer.

A trial was had, resulting in a decree in accordance with the prayer of the complaint, and defendant appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Oliver P. Coshow*.

For respondent there was a brief over the names of *Messrs. Neuner & Wimberly* and *Mr. C. L. Colvin*, with an oral argument by *Mr. Carl E. Wimberly*.

BENSON, J.—The history of this case presents an unfortunate situation. Thomas F. Graber, the payee named in the note and mortgage, was a lawyer, having his offices in Oakland, California. After the final settlement and distribution of the Boswell estate, and

after all of the transactions involved in the present litigation, he died, and the plaintiff, being his widow, succeeded to his interests. She evidently knew very little of her husband's business affairs prior to his death, and there is no one else who can supply the information. If the defendant ever kept any connected record of her financial transactions, it is not before us. Thomas F. Graber apparently left no detailed record of his financial dealings with Mrs. Boswell, other than an account book which was found among his effects in his office, after his decease. Our investigation of the facts then, is confined to the records of the County Court, in the matter of the estate of B. D. Boswell, deceased, the book accounts and canceled checks of Thomas F. Graber, deceased, and the parol testimony of Mrs. Boswell. After a careful investigation of the entire record, we are impressed with the fact that there is no evidence of any conscious bad faith upon the part of any of the parties hereto, or of any desire to deal otherwise than in perfect honesty and fairness.

1. Prior to his death, which occurred on May 19, 1907, B. D. Boswell owned certain lands in Douglas County, Oregon, known as Boswell Springs, whereon he conducted a hotel which was to some extent popular by reason of the reputed medicinal value of the mineral springs situated upon the premises. For several years prior to May 19, 1907, Thomas F. Graber, a practicing attorney, of Oakland, California, had been a close personal friend and the legal adviser of Captain Boswell, and the latter, in his last will and testament had nominated Graber to be the executor thereof, without exacting any bond for the faithful performance of the duties involved therein. Owing to the fact of his being a resident of another state Graber could not

qualify as such executor, and the widow and sole legatee, Emma E. Boswell, received letters testamentary as administratrix, with the will annexed, and Graber was retained by her as her legal adviser. It was soon discovered that while the claims against the estate were considerable, the only ready money amounted to no more than \$108. After her husband's death, Mrs. Boswell continued to conduct the hotel with some success until the summer of 1908, when the buildings were destroyed by fire. Thereafter, Graber suggested to Mrs. Boswell, who in the meanwhile was living in Oakland, California, that she would need money to meet the claims against the estate, as well as for her personal requirements, that she should execute to him a note and mortgage for \$2,000, upon the real estate, out of which claims would be paid, and money provided for her maintenance. This was done on October 22, 1908. Subsequently, a portion of the land was released from the lien of the mortgage, and sold for the sum of \$2,000. On September 1, 1909, Graber mailed to Mrs. Boswell an itemized statement of the fund thus acquired, from which it appears that after paying the principal and accrued interest on a note to the State Land Board, together with taxes thereon, and certain obligations of Mrs. Boswell's, there was a balance of \$578.30, which he paid her by check. This statement disposes satisfactorily of any contention that this fund was applied to the payment of any other claims of Graber against Mrs. Boswell, and brings us to the definite conclusion that any other advances made to her or in her behalf were directly chargeable to the fund provided by the note and mortgage which are the subject of this suit. These items were kept by Graber, in a separate and distinct account in his day-

book, and consist, first, of an item of \$976.64, for claims against the Boswell estate, which had been paid by him. The correctness of this item is disputed by Mrs. Boswell, who testifies that of the \$250 which had been paid for a metallic casket for the remains of the deceased, Mr. Graber paid only \$83.40. An examination of the vouchers filed with the final account discloses that the claim of the undertaker shows three credits of \$50 each, "by check," and credits for poultry and eggs, and a cash payment of \$10, all at dates while Mrs. Boswell was conducting the hotel and sanitarium. The only voucher filed by Graber, in this connection, is for the balance of \$83.40, and we are driven to the conclusion that plaintiff has not established her right to a credit of more than \$83.40 thereon, by a preponderance of the evidence.

2. Another item is that for exhuming and transporting the remains of Captain Boswell to San Francisco for interment at the Presidio. This item is set out in the final account as being \$50 and Mr. Graber filed a voucher therefor in that amount. But we also find him making an additional charge of \$111 therefor, in his personal account against Mrs. Boswell, who insists that even the fifty-dollar charge is excessive. We think the item of \$111 should be eliminated.

The remaining items going to make up the consideration of the note sued upon, consist of a number of sums of money advanced to defendant at various times, certain bills of hers paid by him, and the sum of \$500, which constitutes his charge for legal services, and \$75 as traveling expenses necessarily incurred in the same connection. We are satisfied that these items are correct and reasonable, and should be allowed.

Making the deductions indicated above, the amount of the decree will be reduced from \$3,364.44 to \$2,934.83, with which modification the decree of the trial court is affirmed without costs to either party in this court.

MODIFIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Former opinion modified November 4, 1919.

ON REHEARING.

(185 Pac. 231.)

On rehearing former opinion modified.

MODIFIED.

Mr. Oliver P. Coshow, for the petition for rehearing.

Messrs. Neuner & Wimberly and *Mr. C. L. Colvin*,
contra.

BENSON, J.—The original opinion in this case will be found in 181 Pac. 986, where a statement of the issues may be found. The conditions under which both parties appear, render it exceedingly difficult to arrive at a satisfactory solution of the problems presented. Captain Boswell, a retired officer of the regular army, died at Boswell Springs, in Douglas County, on May 19, 1907, leaving a surviving widow, who is the defendant here, and a small estate, of which the principal item is the real property known as Boswell Springs. Captain Boswell left a will in which he named Thomas F. Graber as executor. The latter, being a resident of Oakland, California, where he was practicing attorney, could not qualify as executor, by

reason of being a nonresident, and so, the widow, Mrs. Emma E. Boswell, was appointed administratrix with the will annexed. Mr. Graber had been the intimate friend and legal adviser of the deceased for many years, and upon the death of the latter, Graber came at once to Oregon to assist the widow, assuming the task of being her legal adviser. He proceeded to direct and manage the probate of the estate, which was finally closed early in 1909. Thomas F. Graber died on September 2, 1914, leaving a will, naming his widow—the plaintiff herein—as executrix.

Upon assuming the duties of legal adviser to Mrs. Boswell, the condition of her estate prompted him to advise her that in order to raise money for her immediate needs and in paying off certain indebtedness, she should give him her note, secured by mortgage upon certain of the real estate, and he would advance the necessary funds. This was subsequently done, the note being for the sum of \$2,000, with interest at 8 per cent. At the time when the note and mortgage were executed, an insignificant amount of money had been advanced by Mr. Graber. Subsequently a portion of the real property was sold for \$2,000, cash.

Mrs. Boswell continued to conduct the hotel at the mineral springs for about a year after her husband's death, when it was destroyed by fire, together with her account-books and all business memoranda, and she then went to California, where she has since resided. She placed implicit confidence in her legal adviser, and as a consequence has to depend very largely upon memory for any evidence of their business transactions, and this source of information is necessarily unsatisfactory. Mr. Graber, while it appears that he was faithful to her interests (although we may well question his judgment in some particulars), was, to

say the least, a slovenly bookkeeper as to his own affairs. His executrix can supply us with no information as to the moneys advanced by her husband, except a carelessly kept and poorly identified day-book, a few canceled checks, and what may be discovered from the public records of the probate court in the matter of the Boswell estate. Counsel for defendant urges very strenuously that since the note and mortgage were given for future advances, the complaint is wholly insufficient, in that it seeks a recovery upon the note itself for the face value thereof, basing the cause of suit upon the note, instead of seeking an accounting to determine the amount of money advanced thereon.

3. The plaintiff replies to this question, that the answer contains a positive allegation that the full amount called for by the note has been paid out of the proceeds of the sale of land above mentioned. The fact is, as disclosed by the record, that at the time issues were joined, both litigants were groping in the dark as to the real situation of affairs, and whatever light is now available to them or to the court is developed by the evidence given upon the trial. The parties are both widows, neither of whom is burdened with wealth, and we have before us all of the evidence that could possibly be produced if we were to require them to join issue again, in a formal suit for an accounting. We shall therefore treat the case as a suit for an accounting, and for a foreclosure of the mortgage to secure the amount so found to be due. The items discussed by us in the former opinion need not be further considered. The amounts secured by the mortgage consist of claims against the Boswell estate paid by Graber and such sums as he advanced to Mrs. Boswell, together with accrued interest on these items from the date of each until paid.

4. Of course, the burden of proof rests upon the plaintiff to establish the amount of money advanced to the defendant. With this rule of law in mind, we have gone over the evidence, item by item. It would be unprofitable to enter upon a discussion of details. We have considered with care the question of the charge of \$500, for the professional services of Mr. Graber, and, under all of the circumstances, we cannot say that the charge is unreasonable.

5. In the argument upon rehearing there was some discussion of the fact that during Graber's lifetime, and after the hotel was burned, Graber had some of the mineral water shipped to him at Oakland, California, for which there has been no accounting. We are unable to find in the record any evidence as to the quantity of water so shipped, or its market value, if it had any, and it is evident from the record, that no living person possessed the desired information, and we are compelled to disregard this contention.

We find, from the evidence, that Mr. Graber paid \$526.53, of the claims against the estate, expended \$75, in traveling expenses in connection with the probate, paid \$7.00 for notarial and recording fees, and plaintiff is entitled to recover these, together with \$500, attorney's fees in probating the estate, with interest to date, amounting in all, to the sum of \$1,796.60. In addition to this, he advanced money to the defendant in the sum of \$340.90, which with interest to date, amounts to \$566.98, and the decree will therefore be for the total sum of \$2,363.58, and the usual decree of foreclosure. Neither party shall recover costs in either court.

FORMER OPINION MODIFIED.

Argued October 2, reversed and dismissed November 4, 1919.

GAMMA ALPHA BLDG. ASSN. v. EUGENE.

(184 Pac. 973.)

Municipal Corporations—Assessments Including Engineer's Charges Valid.

1. Where an ordinance authorizing the opening of a street authorized engineer's charges to be included as a part of the improvement, engineering expenses could be imposed by assessment, although the engineer was not specially employed for the particular improvement and was paid a regular salary by the city from the general fund.

Municipal Corporations—Improvement Contract Including Future Repairs Does not Invalidate Assessment.

2. A contract for paving, which contained provision "that the pavement shall be free from any defects due to faulty workmanship or materials, and that for a period of five years from its completion the city contractor will at his own expense repair and make good any defects arising from such faulty materials," etc., was not invalid as being a contract for repairs not chargeable to private property.

Municipal Corporations—Contract for Paving not Unlawful Delegation of Powers to Engineer.

3. Where a civil engineer, upon request of city officials, has prepared plans and specifications for contemplated improvement, and the officials enter into a contract for the construction thereof, there is not an unlawful delegation to the engineer of the right to decide what are necessary details; the action of the city officials in entering into the contract making the plans and specifications of the engineer their own.

Municipal Corporations—Petitioner for Improvement Estopped to Attack Assessment.

4. Where an abutting property owner petitions the city council to pave a street, the action of the council in contracting for and making the improvement is conclusive, and the petitioner cannot complain that the cost of the improvement exceeds the benefits.

Municipal Corporations—Paving Assessment on Property Fronting on Two Streets.

5. One owning property on a corner abutting upon one street 90 feet and on another 240 feet cannot maintain that his property does not front upon the street on the long side of his property, and that he is not liable for the burden imposed by paving of such street under a charter providing that each lot or part of lot abutting a street or alley, graded, improved or repaired shall be liable for the full cost of making the same upon the half of the street or alley in front or abutting upon it, but that, when the land adjacent to such street shall not have been laid off into lots or blocks, then the cost of the improving such street shall be assessed

to the owner or owners of such land within 160 feet of such improved street.

Municipal Corporations—Assessments for Improvements not Objectionable Because Contract Provided for Eight-hour Day.

6. In view of Laws of 1913, page 11, expressly forbidding a municipality either directly or through a contractor to require more than eight hours per day or forty-eight hours per week from any employee, one assessed for an improvement cannot maintain that city had no right to limit the employment of laborers for more than eight hours per day in its contract for the improvement.

Easements—Not Interfering with Right of Owner to Use Soil.

7. The conveyance of an easement in land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.

Waters and Watercourses—Right of Owner to Improve Easements Appurtenant to Mill-race.

8. Where owner of mill-race had an easement in property along the side of the race in that it had the right to widen the same when necessary, abutting owner, who undertakes to improve and occupy the land abutting on the mill-race, is not a trespasser, unless his occupation or improvement is such as interferes with the operations of the owner of the mill-race.

Municipal Corporations—Retaining Wall Improvements Built on Property Subject to Easement.

9. A contract of a city for the paving of a street was not invalid by reason of the required construction of a retaining wall at the end of the street abutting upon a mill-race, although the owner of the mill-race had an easement on the property where the retaining wall was built, in that it had a right to widen and deepen its mill-race.

Municipal Corporations—Departure from Contract for Improvement.

10. Where a city was authorized to pave a street which ran to the banks of a mill-race, the construction of a retaining wall at the end of the street abutting on the mill-race was not a departure from the purpose of the improvement, although made for the whole width of the street, for the purpose of also supporting a fill for sidewalks that might be constructed.

From Lane: JAMES W. HAMILTON, Judge.

Department 1.

This is a suit to remove a cloud from the title to real estate. It is founded upon the action of the municipal authorities of the City of Eugene in paving that portion of Alder Street in Eugene from its intersection with Eleventh Avenue, north to the mill-race. The

plaintiff claims to be the owner of a piece of land with a frontage of 90 feet on Eleventh Avenue, and about 240 feet abutting on Alder Street. The validity of the assessment for such street improvement is attacked by the complaint upon several grounds, which will be specifically mentioned in the opinion of the court. The defendant's answer after denying the allegations of the complaint, sets up several affirmative defenses, the first of which is, that at all the times mentioned in the complaint, the property claimed by the plaintiff was and still is owned by W. E. Brown, as disclosed by the deed records of Lane County. The answer then recites the various proceedings by ordinance and otherwise, of the municipal authorities in making the improvement, the further fact that plaintiff and W. E. Brown had knowledge of all the proceedings and urged the awarding of the contract and the construction of the work according to the plans and specifications, and that after the levying of the assessment therefor, W. E. Brown made application to be allowed to pay such assessment in ten annual installments, under the terms of what is generally known as the Bancroft Bonding Act, and in such application, agreed as follows:

"In consideration thereof, and in pursuance of the provisions of said act aforesaid, I hereby expressly waive all or any irregularity or defect, jurisdictional or otherwise, in the proceedings to improve said street, or lay said sewer, and in the apportionment and assessment of the cost thereof on the property affected thereby."

It is then alleged, that because plaintiff permitted and allowed Brown, holding the record title, to manage, control and exercise dominion over the land, in regard to this improvement, the plaintiff should be es-

topped from contesting the validity of the assessment. Any further development of the pleadings which may be necessary to the consideration of the case will be found in the opinion. Upon the trial, there was a decree for the plaintiff, declaring the assessment void and enjoining its collection. Defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief and an oral argument by *Mr. O. H. Foster*.

For respondent there was a brief over the names of *Mr. L. M. Travis* and *Mr. A. K. Meck*, with an oral argument by *Mr. Travis*.

BENSON, J.—The plaintiff's attack upon the validity of the assessments is first based upon the fact that it includes a charge of 5 per cent of the contract price of the work for engineering expenses. The initial ordinance in the proceeding contains this clause:

"And there shall be included as a part of said improvement, engineer's charges not to exceed five (5%) per cent of the contract price and when said cost shall be assessed the same shall be a lien upon the property so benefited, etc."

1. It appears from the testimony that the engineer was not specially employed for this particular job, but was a regularly employed and salaried official of the city, whose compensation was not dependent upon the collection of the assessments for this particular improvement. Plaintiff and defendant both cite and rely upon the cases of *Smith v. Portland*, 25 Or. 297 (35 Pac. 665), and *Giles v. Roseburg*, 82 Or. 67 (160 Pac. 543). In neither of these cases is the compensation of a regular, salaried official involved. In the former, an overseer was specially employed to oversee the construction

of a sewer, and neither in the charter nor in the ordinance, was there any provision for such a charge, hence it was held that such expense could not properly be charged against the property benefited. In the latter case the engineer did not receive a regular salary, but was paid a stated daily compensation for the services rendered, and received his remuneration in the warrants drawn upon the general fund, and not from funds arising from the assessment for the particular work upon which he was employed. In this case, like the first, there was nothing, either in the charter or the ordinance under which the improvement was made, authorizing such expense to be charged against the property. The latter case, therefore, holds, as did the former, that in the absence of authorization by ordinance, such expense could not be imposed by assessment. In the case at bar, however, the ordinance expressly authorizes it, and it is therefore a valid charge, unless it be excluded by reason of the fact that the engineer receives a regular monthly salary, which we may fairly infer is paid from the general fund. If this were a new question with this court, it might be necessary to consider the authorities in other jurisdictions, but the matter is conclusively settled in the case of *Irelan v. City of Portland*, 91 Or. 471 (179 Pac. 286), wherein it is held that such a provision in an ordinance is valid, even where the city official is paid a regular salary.

2. Plaintiff further contends that the assessment was invalid, because the contract for the improvement contains the following clause:

“The contract further agrees that the payment shall be free from any defects due to faulty workmanship or materials and that for a period of five years from its completion, the said contractor will, at his own ex-

pense, repair and make good any defects arising from such faulty materials or workmanship and due to the proper use of such pavement as a roadway."

It insisted that this is a contract for repairs which should not be charged to private property. This contention is not sustained by the language of the clause quoted and is completely answered in the case of *Allen v. Portland*, 35 Or. 420 (58 Pac. 509).

3. The next objection is, that the council exceeded its powers in delegating to the city engineer the right to decide what are necessary details of the improvement, such as inlets, retaining walls, etc. This point is not well taken. The officers of a city employ a civil engineer for the very purpose of relying upon his special training and skill, to advise them as to the necessary details of a contemplated improvement, and when, upon their request, he has prepared plans and specifications for the same, and they enter into a contract for the construction thereof, they thereby adopt and approve them and make them their own.

4. It is then argued that the cost of the improvement exceeds the benefits, and that this invalidates the assessment. The complaint does not charge fraud; the evidence discloses that plaintiff's property abuts upon the pavement for a distance of 240 feet, in addition to which, plaintiff petitioned the city council to make the improvement. Under these circumstances the action of the council in the premises is conclusive: *Colby v. City of Medford*, 85 Or. 485 (167 Pac. 487).

5. The next ground of attack upon the assessment is plaintiff's theory that its property does not front upon Alder Street and is therefore not liable to the burden. This theory is based upon the language of the charter, Section 71 of which reads thus:

“Each lot or part of lot abutting a street or alley graded, improved or repaired, shall be liable for the full cost of making the same upon the half of the street or alley in front of and abutting upon it; * * But when the land adjacent to said street shall not have been laid off into lots and blocks, then the cost of improving such streets shall be assessed to the owner or owners of the land lying within one hundred and sixty feet of such improved street.”

The evidence discloses the plaintiff's land has not been laid off into lots, although it has a frontage of 90 feet on Eleventh Street and about 240 feet on Alder Street, being a corner tract. The contiguous land west of plaintiff's tract is subdivided into lots and blocks. We cannot see how the plaintiff's interpretation of Section 71 can be justified. The property being a corner, at the intersection of two streets is intended, by the statute, to bear its portion of the improvement of both streets, and this would be equally true, if plaintiff's tract extended westerly 160 feet instead of 90. Plaintiff relies upon the case of *Rooney v. Toledo*, 9 Ohio C. C. 267, to support its theory. That case differs from the one at bar, in that the statute under which that decision was rendered provided for assessing the property, not by the benefits accruing, but by the front foot, and the court held that upon paving the *side* street, the frontage of the corner lot should be limited to that portion of its length which would equal the length of its end or front on the intersecting street. Here, the statute declares that the burden shall be borne, for one half of the paving by the property in front of and abutting upon it. In *City of Springfield v. Green*, 120 Ill. 269 (11 N. E. 261), the ordinance directed that—

The tax shall be “levied, assessed and collected upon and from the real estate, lots, parts of lots, and tracts

of land abutting upon the line of said streets so ordered to be paved in proportion to the frontage thereof upon the streets, or parts of streets, and alleys ordered to be paved, as aforesaid."

The appellant there contended that since the *side* of his property adjoined the improvement, it was not liable to assessment. The court, in its opinion, concluded thus:

"The whole of the ordinance considered, we have no doubt that the word [abutting] was intended to apply to lots whose sides as well as ends were bounded by the line of the streets to be improved, and that where the streets in front and at the side were both to be paved, it was the intention of the council that the corner lot should bear one half of the expense of the improvement in front of the side as well as of the end of the lot. Any other construction of the ordinance would leave no provisions whatever for paying for the pavement of those parts of the streets directed to be improved, which lie in front of the sides of lots located on the line of said streets."

We can see no escape from the logic of this deduction and hold that in this respect plaintiff's property was properly assessed.

6. It is further urged that the city had no right to limit the employment of laborers for more than eight hours per day, in its contract for the paving. It is enough to say, that Chapter 1, Laws of 1913, expressly forbids a municipality either directly or through a contractor to require more than eight hours per day, or forty-eight hours per week, from any employee, and inserting such a clause in the contract the defendant was simply obeying a compulsory statute.

7-9. The serious contention of the parties upon this appeal arises in regard to what plaintiff styles a "bridge abutment" and which is termed by the defend-

ant a "retaining wall." The evidence quite clearly establishes the fact that it is a retaining wall.

A certain mill-race, flowing in a westerly direction, crosses Alder Street at a right angle. The street paving was extended to the water's edge at this mill-race and at that point a concrete retaining wall was constructed, across the street to support a fill behind it, upon which the paving was laid. The complaint pleads a decree of this court in the case of *Patterson v. Chambers Power Co.*, 81 Or. 328 (159 Pac. 568), and *Eugene v. Chambers Power Co.*, 81 Or. 352 (159 Pac. 576). In those cases, the one issue pertained to the right of the defendant to widen the same mill-race that crosses Alder Street as above stated. Plaintiff insists that under the decree in those cases, the defendant became a trespasser, and exceeded its power, when it constructed the retaining wall and did some paving within the limits wherein the decree authorized the owners of the canal to widen the same. Turning to the opinion of this court in the case of *Patterson v. Chambers Power Co.*, upon which the decree in the Eugene case is founded, we find that the rights of the Chambers Power Co. and its successors are traced to a certain warranty deed, containing a clause which reads as follows:

"Together with the water-power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and all other mills or machinery that may at any time or times, be placed upon the above described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair."

The decree of this court permits the owners of the mill-race to widen it so as to bring it up to fifty feet in width. Such decree has not yet been utilized by the owners, and the width of the canal remains as before, while the adjacent land owners are still using their land to the water's edge. As was very properly said by this court in that case:

"The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement; Washburn, Easements (3 ed.), 3, 9; Goddard, Easements, 4. It follows, therefore, that the plaintiffs who are successors of Shaw, had a perfect right to occupy and improve their land adjoining the ditch, so long as such occupation or improvement did not interfere with the operations of defendants. Defendants were never in a position to bring ejectment or trespass against them until they were in a position to show that the use of the adjoining land was necessary, and that the growth of manufacturing business upon the 23-acre tract made it essential for them to widen the ditch to procure additional power."

It follows that the city had a perfect right to extend its paving, and construct its retaining wall, where it did. It may be, that at some future time, the owners of the mill-race may require the destruction of a portion of this improvement, but that possibility cannot concern the present paving, for the city is not required to keep hands off of its streets until some uncertain time when the owners of the viaduct may see fit to enlarge their plant.

10. It is also urged that the city built more of the retaining wall than was necessary to support the paving. The evidence discloses that while the portion of the street which is paved is only 24 feet wide, the retaining-wall is the full width of the street. The city

engineer testified that this was done with a view of making a permanent improvement of it, and to enable the fill to support sidewalks when they should be ordered. We think this to be a proper method of construction and not a departure from the purpose and proposed extent of the improvement.

The decree of the lower court is reversed and one will be entered here dismissing the suit.

REVERSED AND DISMISSED.

McBRIDE, C. J., and BURNETT and BENNETT, JJ.,
concur.

Argued April 9, affirmed April 29, rehearing denied November 12,
1919.

STATE v. FRASIER.*

(180 Pac. 521.)

Criminal Law—Jurisdiction.

1. Where a court has jurisdiction of a crime a statute simply conferring same jurisdiction on another court does not deprive former of its jurisdiction, in absence of an express provision or clear implication to that effect, but merely confers concurrent jurisdiction.

Criminal Law—Federal Jurisdiction.

2. The criminal jurisdiction of federal courts is confined to crimes under federal statutes except as to common-law offenses committed

*On necessity in indictment for forgery or uttering forged instrument of naming person to whom instrument was passed, see note in 31 L. E. A. (N. S.) 1046.

Authorities passing on the question as to whether making or altering mere memorandum in the nature of a receipt or acquittance constitutes forgery are collated in a note in 54 L. E. A. 794.

On power of legislature to provide for indictment in county or district other than where crime alleged to have been committed, see note in 7 L. E. A. (N. S.) 669.

As to who is within protection of provision of Bankruptcy Act as to use in criminal proceeding of testimony given by bankrupt, see note in L. E. A. 1917B, 614.

on the high seas, or in places or districts within the states which have been ceded to the United States, and which, when the crime was committed, were under the exclusive jurisdiction of the United States.

Criminal Law—Jurisdiction—Offenses Against State and United States.

3. Offenses which are directed against the sovereignty of the state or which affect its population are within the jurisdiction of the state courts, although such offenses may also be directed against the sovereignty of the federal government, and may be thus within the jurisdiction of both the federal and the state courts.

Criminal Law—Jurisdiction of State Court—Forgery.

4. Where the uttering of a forged receipt constituted forgery under the laws of the state, the jurisdiction of the state court is not ousted by the fact that the same acts, consisting of uttering and publishing a forged instrument to a referee in bankruptcy appointed by the federal court, are also an offense under the laws of the United States.

Forgery—Indictment—Purport of Instrument.

5. Where an indictment for forgery described a false and forged "writing, check, receipt and instrument, being in the form of and purporting to be an indorsed, canceled and paid check, and being in the words and figures as follows, to wit," followed by a copy of the check with the indorsement, words, figures and marks thereon, it was not essential that the words "purporting to bear the indorsement of," should be employed.

Forgery—Indictment—Legal Efficacy of Instrument.

6. In an indictment for uttering a forged receipt, it should appear from the indictment that the receipt is *prima facie* capable of being used as legal proof in some way.

Forgery—"Receipt"—Canceled Check.

7. A canceled check or check indorsed and stamped "Paid" may be the subject of forgery under Section 1996, L. O. L., such an instrument serving in the business world as a voucher or receipt for the payment of the amount of money named in the check.

Indictment and Information—Statutory Offense.

8. It is the general rule that, if an indictment is based upon a statute, it is sufficient if it follows the wording thereof.

Forgery—Indictment—Name of Person Defrauded.

9. Under Section 1996, L. O. L., an indictment for uttering a forged receipt need not state the name of the person defrauded.

Forgery—Indictment—Proof.

10. It being alleged in an indictment that a forged check was published to A., as a referee in bankruptcy, it was necessary for the proof to show the same.

Forgery—Evidence.

11. Under an indictment for uttering a forged canceled check as a receipt, alleging that it was published to A. as referee in bankruptcy, it was proper for the state to show that A. was acting as a referee in bankruptcy by appointment of the federal court, and to introduce evidence of the proceedings in bankruptcy in the bankrupt estate of the defendant, as part of the circumstances of the transaction relating to the canceled check.

Forgery—Indictment—Tenor of Instrument.

12. Under Section 1996, L. O. L., relating to forgery, it was not necessary to set out the tenor of the instrument alleged to be forged, in view of page 1013, Form 15, L. O. L.

Forgery—Indictment—Name of Person Defrauded.

13. Under Section 2004, L. O. L., the name of the person defrauded need not be inserted in an indictment for uttering a forged receipt.

Forgery—Indictment—Legal Efficacy of Instrument.

14. An averment in an indictment for uttering a forged receipt in the form of a canceled check, indorsed and stamped "Paid," etc., that the instrument was published to A., as referee in bankruptcy, as a receipt and as evidence of the payment of a debt, was all the extrinsic facts necessary to set out, in addition to the instrument itself, to show that the receipt, if it was genuine, would be of force as legal proof.

Forgery—Indictment—Extrinsic Matter.

15. In an indictment for uttering a forged instrument, where the meaning of the transaction can be sufficiently extracted from the instrument itself, it is not necessary to state matters of evidence so as to make out more fully the charge.

Indictment and Information—Certainty.

16. Under Section 1449, L. O. L., an indictment will not be held insufficient where the acts charged as a crime were displayed with such degree of certainty as to fully inform defendant of nature of offense with which he was charged, and to enable a person of common understanding to know what is intended and to prepare for his defense.

Forgery—Indictment—Receipt.

17. A receipt for money paid is not such instrument that an indebtedness from the person to whom it purports to be given to the maker of it need be shown in an indictment for uttering a forged receipt, because, if in fact there were no such indebtedness, still the party giving it would be liable for the money acknowledged to have been received.

Forgery—Alteration of Instrument.

18. One who alters a genuine instrument may be charged with forgery of the entire instrument.

Criminal Law—Weight of Evidence—Review.

19. It is not the province of the Supreme Court on appeal in a criminal case to consider the weight of the evidence.

Forgery—Uttering Instrument—Evidence—Directed Verdict.

20. In a prosecution for uttering a forged receipt, namely, a canceled check stamped "Paid" and indorsed, *held*, that evidence strongly supported a conviction, so that a request to direct a verdict of acquittal was properly denied.

Forgery—Instructions.

21. In a prosecution for uttering a forged receipt, namely, a canceled check stamped "Paid," and indorsed, an instruction relative to the theory of the state that the indorsement was forged on a check, and that, taken together with the check, it operated and was used as a receipt for money paid, *held* properly to submit the issues in the case.

Criminal Law—Orders Appealable—Motion for New Trial.

22. General Laws of 1915, page 96, amending Section 548, L. O. L., so as to allow an appeal from an order setting aside a judgment and granting a new trial, does not apply to criminal actions.

Criminal Law—Appeal—Exceptions.

23. In a prosecution for uttering a forged receipt, accused cannot complain that account-books, exhibits in the case, were removed from courtroom during argument, where it appeared that they were returned, and an offer made by counsel for the state to have them sent to the jury while they were deliberating, but, objection being made by defendant's counsel, they were not so disposed of; no exception having been taken in regard to the matter nor any ruling having been made.

ON PETITION FOR REHEARING.**Bankruptcy—Testimony of Bankrupt Used Against Him in Criminal Prosecution.**

24. Bankruptcy Act of 1898, Section 7 (U. S. Comp. Stats. Section 9591), providing that no testimony given by bankrupt shall be offered against him in any criminal proceeding, does not apply to the language and acts of a bankrupt who in the course of his examination upon the witness-stand commits a fresh crime, such as perjury or the uttering of a forged instrument.

From Benton: JAMES W. HAMILTON, Judge.

Department 2.

The defendant E. J. Frasier was indicted by the grand jury of Lane County, Oregon, for the crime of uttering a forged receipt. The case was transferred to Benton County where he was tried and convicted.

From the judgment of sentence, defendant appeals.

The charging part of the indictment is as follows:

"The said E. J. Frasier, on the 11th day of August, A. D. 1917, in the County of Lane, State of Oregon, then and there being did then and there willfully, knowingly and feloniously, utter and publish, as true and genuine, to one A. M. Cannon, as Referee in Bankruptcy, a certain false and forged writing, check, receipt and instrument, as evidence of money paid on a debt, knowing the same to be false and forged, the said writing, check, receipt and instrument being in the form of and purporting to be an indorsed, canceled and paid check, and being in words and figures as follows, to wit:

" 'Eugene, Oregon, Oct. 10th, 1909, No. ____.

" 'FIRST NATIONAL BANK, \$69.00

" 'Eugene, Oregon.

Pay to T. W. Harris.....or bearer
Sixty-nine and No 100.....Dollars
Med. Services

" 'E. J. FRASIER.'

bearing the indorsement, 'T. W. Harris' bearing the impression of an encircled letter 'P,' and being perforated by a mark in the following letters and figures, 'PAID 10 11 09'; with intent to injure and defraud; contrary to the statutes, etc."

The defendant demurred to the indictment upon the following grounds: First. That the crime charged is not triable within the County of Lane, State of Oregon. Second. That the facts therein stated do not constitute a crime.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Weatherford & Wyatt* and *Mr. Whitton Swafford*, with oral arguments by *Mr. James K. Weatherford* and *Mr. Swafford*.

For the State there was a brief with oral arguments by *Mr. Arthur Clarke*, District Attorney for Benton

County, *Mr. George M. Brown*, Attorney General, and *Mr. L. L. Ray*, District Attorney for Lane County.

BEAN, J.—The overruling of the demurrer to the indictment is assigned as error, and several objections and exceptions to the testimony are upon the ground of the insufficiency of the charge.

The contention is made that by reason of the allegation in the indictment that the defendant did “wrongfully and unlawfully and feloniously, utter and publish, as true and genuine, to one A. M. Cannon, as Referee in Bankruptcy, a certain false and forged writing,” etc., if the indictment is sufficient to constitute a crime, the question would be one for the federal courts and not in the state courts.

Section 1996, L. O. L., declares *inter alia* that if anyone shall falsely make, alter, forge or counterfeit any writing, obligatory promissory note evidence of debt, indorsement, check “or any receipt for money or other property, or any acquittal or discharge for money or other property,” with intent to injure or defraud anyone, or shall with such intent knowingly utter or publish as true or genuine any such false, altered, forged or counterfeited writing, instrument, or matter whatever, such person, upon conviction thereof, shall be punished.

It is clear that the statute of this state denominates the utterance of a forged receipt as a crime against the laws of this state, and the courts of this state have jurisdiction of the crime unless precluded by some federal law. This is conceded, but it is contended that as the forged instrument is alleged to have been passed to A. M. Cannon, as referee in bankruptcy, the courts of the United States have exclusive jurisdiction over the offense.

1-4. Where a court has jurisdiction of a crime, a statute simply conferring the same jurisdiction on another court does not deprive the former of its jurisdiction, in the absence of an express provision or clear implication to that effect, but merely confers concurrent jurisdiction. In some cases the jurisdiction of the federal courts over offenses is exclusive of the jurisdiction of the state courts, while in others it is concurrent: 16 C. J., §§ 173, 174, pp. 150, 151. The criminal jurisdiction of the federal courts is confined to crimes under federal statutes, except as to common-law offenses committed on the high seas or in places or districts within a state which have been ceded by the state to the United States, and which when the crime was committed were under the exclusive jurisdiction of the United States. Offenses which are directed against the sovereignty of the state or which affect its population are within the jurisdiction of the state courts, although such offenses may also be directed against the sovereignty of the federal government, and may be thus within the jurisdiction of both the federal and the state courts: 16 C. J., § 185, p. 160. We will assume without deciding that the federal courts would have jurisdiction of the offense charged. It is unnecessary to go further. Where certain acts constitute forgery under the laws of the state the jurisdiction of state courts is not ousted by the fact that the same acts are also an offense under the laws of the United States: 19 Cyc., p. 1391. The courts of this state have jurisdiction of the crime referred to in the indictment whether or not the United States courts have jurisdiction of such crime: *Territory of Oregon v. Coleman*, 1 Or. 191, 192. In *Cross v. North Carolina*, 132 U. S. 131 (33 L. Ed. 287, 10 Sup. Ct. Rep. 47, see, also, Rose's U. S. Notes), it was held that: A state

is not deprived of jurisdiction over a person who criminally forges a bill of exchange or promissory note with intent to defraud, in violation of its statutes, or of its power to punish the offender committing such offense, by the fact that he follows this crime up by committing against the United States the further crime of making false entries concerning such bill or note on the books of a national bank, with intent to deceive the agent of the United States designated to examine the affairs of the bank, and in violation of the statute of the United States in that behalf. It is stated in 12 R. C. L., Section 16, page 152, as follows:

“The courts of the states and territories may punish the forgery of treasury notes of the United States, although Congress has passed an act for the punishment of such offenses.”

As to the place where the alleged forged instrument was published, it does not appear either from the allegations of the indictment or the testimony that such place was ceded to and under the exclusive jurisdiction of the United States as provided by Section 711, United States Revised Statutes: U. S. Comp. Stats. (1916), § 1233; 5 Fed. Stats. Ann. (2 ed.), p. 922, see, also, 8 R. C. L., § 57, p. 98. The cases cited by the defendant upon this point are mostly where the prosecution of the crime is within the exclusive jurisdiction of the federal courts being a violation of the United States statute, as prosecution for perjury in making a false oath under the Homestead Act of Congress, or in swearing falsely before the register of the United States land office in a proceeding touching the public land, and not a violation of the state statute.

The further contention is made: First. That the indictment does not state facts sufficient to constitute a crime, in that the indictment contains no allegation of

appointment of Mr. Cannon by any court. Second. That in order to be the subject for forgery, the instrument upon its face must if it were genuine be of some benefit, force or effect or injury to another. It will be observed that the instrument in question is alleged to have been forged and is set out in full in the indictment. The manner in which it is set forth in an indictment is criticised by the defense, especially that part of the indictment which states, "bearing the indorsement 'T. W. Harris.' " It should be borne in mind that the indictment further states "the said writing, check, receipt and instrument being in the form of and purporting to be an indorsed, canceled and paid check," therefore it is apparent from the face thereof that it is the forged instrument that is set out therein and that the words "bearing the indorsement" refer to the purported instrument only, and is not an allegation that the check was indorsed by T. W. Harris.

5. According to the later doctrine, where an indictment alleges that an instrument is "forged," it sufficiently imputes falsity to the instrument so that the pleader in setting out the instrument may aver that the defendant forged "a certain will" or "a certain false, etc., paper writing purporting to be the last will" that is the words "purporting to be" may be omitted: Wharton's Criminal Pleading & Practice (9 ed.), § 184; Wharton's Criminal Law (10 ed.), § 738.

In the indictment in question the instrument is described as a false and forged "writing, check, receipt and instrument being in the form of and *purporting to be* an indorsed, canceled and paid check, and being in words and figures as follows, to wit": Then follows a copy of the check with the indorsement, words, figures and marks thereon. Hence it is not essential that the words "purporting to bear indorsement of T. W.

Harris" should be employed as the check or receipt had already been described as "purporting to be an indorsed, canceled and paid check," and there is no room for misunderstanding in regard thereto.

6, 7. As to the effect of the instrument alleged to be forged and to have been uttered, it should appear from the indictment that it is *prima facie*, capable of being used as legal proof in some way; for example, as a receipt in a suit against the forger by the person whose receipt is forged: Wharton's Criminal Law (10 ed.), § 739; 19 Cyc. 1394. It cannot be questioned but that in an action by T. W. Harris to recover money of defendant Frasier, the document described in the indictment, if genuine, could be used as legal proof of the payment by defendant of the amount of the check. It is well known in the business world that a canceled check, or check indorsed and stamped "Paid," serves as a voucher or receipt for payment of the amount of money named in the check. In Wharton's Criminal Law (10 ed.) (Kerr), Section 672, the author states:

"An instrument, to be the subject of forgery, must be one within the statute, and which, if genuine, would have some legal effect, but it is not necessary that it should be shown to be a perfect instrument, and it is unnecessary for the indictment or information to allege how the instrument would create, increase, diminish, or defeat a pecuniary obligation, or how it would transfer or affect the title to property. Thus, a receipted bill for goods charged to have been forged, being set out, and purporting on its face to be an instrument which may be forged under the statute, the indictment or information need not contain further allegations to show that it was such an instrument, or to show how it could be used as an instrument of fraud, or that it was so used, in fact. It is not necessary to allege the existence of the debt, the discharge of which the instrument alleged to be forged was intended to represent, except under unusual circum-

stances; or that accused was indebted to the person intended to be defrauded by such receipt. * * ”

See, also, *State v. Dunn*, 23 Or. 562 (32 Pac. 621, 37 Am. St. Rep. 704).

It is elementary law that an ordinary receipt or acquittance may be the subject of forgery: Section 1996, L. O. L.; 2 Bishop's New Criminal Law, § 529. A receipt is defined as "A written acknowledgment of payment of money or delivery of chattels"; 2 Bouvier's Law Dictionary, p. 832. See, also, 7 Words and Phrases, p. 5987. In the case of *Kegg v. State of Ohio*, 10 Ohio, 75, it was held that an indorsement on a note of a partial payment, in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt, the alteration of which by the payee is forgery. " 'Settled, Sam. Hughes,' at the foot of a bill of parcels, was held to support an allegation of a receipt without any explanatory averment": Wharton's Criminal Pleading & Practice (9 ed.), § 185.

8-13. It is the general rule that if an indictment is based upon a statute it is sufficient if it follows the wording thereof. It was not under our statute absolutely necessary to allege to whom the receipt was uttered or passed. It being alleged that it was published to A. M. Cannon, as referee in bankruptcy, it was necessary for the proof to show the same. This, we think, could be done under the allegation of an indictment by showing that he was acting as a referee in a bankruptcy matter by appointment of the federal court. Under our statute, it is not necessary to set out the tenor of the instrument alleged to have been forged: See Form 15, p. 1013, L. O. L.; *State v. Childers*, 32 Or. 119 (49 Pac. 801); 19 Cyc. 1398. The name of the person defrauded need not be inserted in the indict-

ment: Section 2004, L. O. L.; *State of Oregon v. Lurch*, 12 Or. 99, (6 Pac. 408); *State v. McElvain*, 35 Or. 365 (58 Pac. 525).

14-16. This case is entirely different from that of *People v. Cole*, 130 Cal. 13 (62 Pac. 274), cited among others and relied upon by counsel for defendant, in which it was alleged in the indictment that the defendant published and attempted to pass to one L. a certain forged check "as the true and genuine check of S. B. Smith," the check being set out *in haec verba* and signed "E. J. Cole," indorsed on back "S. B. Smith," with intent, etc. The check did not purport to be signed by S. B. Smith but by E. J. Cole, the defendant, and it was held that the check showed upon its face that it was not forged, but rightly signed by the defendant; that if the indorsement of S. B. Smith was forged, the information should have so stated. In the instant case the indictment shows that the whole document, including the check, indorsement, impression and marks, is alleged to be forged, and to have been passed as true and genuine as evidence of the payment of a debt, that is, as the receipt or acquittance of T. W. Harris. The charge does not state or imply that the indorsement of T. W. Harris was forged for the purpose of making him appear to be liable as an indorser on the check, except in so far as the whole instrument taken as a voucher or receipt might show liability. The averment that the instrument was published to A. M. Cannon, as referee in bankruptcy, as a receipt as evidence of the payment of a debt, was all the extrinsic facts necessary to set out, in addition to the instrument itself, to show that the receipt, if it were genuine, would be of force as legal proof, so as to comply with the rule in 2 Bishop on Criminal Law (7 ed.), Section 545, and 1 Wharton's Criminal Law

(10 ed.), Section 740. Where the meaning of the transaction can be sufficiently extracted from the instrument itself, it is not necessary to state matters of evidence so as to make out more fully the charge: 1 Wharton's Criminal Law (10 ed.), § 740, p. 674. The document not being in the regular form of a receipt, it was appropriate to state in the indictment that it was published as true and genuine as evidence of money paid on a debt. Thus the whole transaction was displayed in the indictment with such a degree of certainty to fully inform the defendant of the nature of the offense with which he is charged and to enable a person of common understanding to know what is intended and to prepare for his defense, and is sufficient under the statute: See Form 15, p. 1013, L. O. L.; *State v. Mishler*, 81 Or. 548 (160 Pac. 382). Section 1449, L. O. L., provides:

"No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Therefore, there was no error in overruling the demurrer to the indictment nor in admitting in evidence the order of the federal court appointing A. M. Cannon as referee in bankruptcy, and evidence of the proceedings in bankruptcy in the bankrupt estate of Edward J. Frasier, the defendant, as a part of the circumstances of the transaction relating to the canceled check. The weight of authority appears to be to the effect that the name of the person to whom the forged instrument was uttered or upon whom passed need not be set out, in the absence of a statutory provision requiring it to be done: 1 Wharton's Criminal Procedure, § 675. Our statute does not contain such a re-

quirement. Hence the averment that the receipt was published to A. M. Cannon as referee, etc., was sufficient, in order to admit the proof of the official character of A. M. Cannon. There was no error in overruling the objection of defendant to such proof upon the ground that the indictment was insufficient in that respect. The purpose of this averment was not so much to show the name of the person or officer to whom the receipt was uttered as to indicate the manner in which the spurious receipt was attempted to be made available.

It is claimed by defendant that the averments of the indictment should recite the indebtedness of the defendant to T. W. Harris, and also that the court erred in admitting over the objections and exceptions of counsel for defendant proof of such indebtedness, for the reason that the indictment did not contain such an averment.

17. A receipt for money paid is not such an instrument that an indebtedness from the person to whom it purports to be given, to the apparent maker of it, need be shown in the indictment; because, if in fact there were no such indebtedness, still the party giving it would be liable for the money acknowledged to have been received: 1 Wharton's Criminal Procedure (10 ed.) (Kerr), § 672; 2 Bishop's New Criminal Law, § 546, subd. 5.

18. If a defendant has altered a genuine instrument, he may be charged with the forgery of the entire instrument: 19 Cyc. 1394c; *People v. Brotherton*, 47 Cal. 388. In the case at bar, the whole receipt is alleged to be forged. The indorsement of T. W. Harris appearing on the canceled check served as a signature to the receipt just as effectively as if it had appeared after the statement that the check was paid. It is not essen-

tial in an indictment for forgery to aver separately as to each part of the instrument alleged to be forged that such parts were forged. It was therefore competent over the objections and exceptions of the defendant for the state to prove that the signature of T. W. Harris was not genuine, and all of the circumstances in relation to the canceled check including the testimony in relation to the fraudulent stamping and perforating the same as paid. Most of the objections of the defendant to the testimony are based upon the insufficiency of the indictment and need not be further adverted to.

Defendant at the close of the case moved the court to direct a verdict of not guilty. This raises many of the questions presented in the case which have already been referred to.

As we understand the position of the defendant the motion for a directed verdict is made and here urged upon the ground that there is no basis for the testimony introduced by the state adduced to show that the receipt was spurious. Referring again to the indictment, the question is asked in defendant's reply brief: "What writing was forged?" Was the check, receipt or instrument forged, or was it some other part of the paper that was forged? Answering this question again, the indictment alleges that the whole instrument was forged. The receipt is not referred to in the indictment as "check, receipt, or instrument," as in the question, but as "check, receipt and instrument," only one document is referred to under the different names.

Considering the motion to direct a verdict from the record, the testimony tended to support the allegations of the indictment and to show that on August 11, 1917,

the defendant presented the canceled check or receipt to A. M. Cannon, as referee in bankruptcy, in the matter of the claim of Dr. T. W. Harris for about \$153 against the bankrupt estate of defendant, to which objection had been made, and represented that the check had passed through the bank upon which it was drawn, and had been paid as shown by the stamp thereon, and that the claim of Dr. Harris had been paid. The testimony indicates that the check which forms a part of the receipt was never indorsed by T. W. Harris, had never been presented to or paid, stamped or marked by the bank and that the receipt was a forgery; that on October 8, 1909, a check of defendant's for \$69 was received by Olds, Wortman & King, of Portland, Oregon, and credited to defendant and paid on October 11, 1909, in due course of business by the First National Bank of Eugene, and charged to defendant's account; that among the stubs of the checks of defendant was one for \$69, apparently written on October 6, 1909, to Olds (the next word beginning with W., the remainder of the word not being discernible) & King. So that one investigating the questioned check at the bank would find that a check for \$69 was charged to defendant's account at about the date of the check in question. The testimony further tended to show that the form of the check which is a part of the instrument questioned was not in use by the bank named at the time the check purports to have been drawn, nor of the date of its cancellation; that the cancellation by perforation was not done with the machine of that bank, and that the rubber stamp with which the encircled "P" was put on the instrument was not the stamp of that bank.

19, 20. It is not our province to consider the weight of the evidence; suffice it to say that it strongly sup-

ports the verdict. There was no error in denying the request to direct a verdict of not guilty. Exception is saved to that part of the charge of the court to the jury which is as follows:

"The indictment in this case charges that the check and the alleged indorsement and other matters appearing thereon to which your attention has already been called constitute a receipt. It is the claim of the state that that was used in being uttered to Mr. Cannon, the Referee in Bankruptcy.

"The indorsement on the check is a material matter. It is alleged that the indorsement is a forgery of the name of T. W. Harris and it would be necessary for the state to prove by evidence to your satisfaction beyond a reasonable doubt the fact of the falsity of the instrument, and that would include the indorsement of the name of T. W. Harris. It is the theory of the state that the name of T. W. Harris was forged on the check and that taken together it operated and was used as a receipt for money paid. * * "

21. The indorsement of the check, as we have already stated, functioned as the signature, and tendered to show that the check had passed through the hands of T. W. Harris. We think the trial court correctly charged the jury and fairly submitted the question to that tribunal. A careful examination of the instructions of the court to the jury does not disclose that the instruction quoted was out of harmony with the ruling of the court during the trial of the cause. At the appropriate time, the defendant filed a motion for a new trial based, among other things, upon errors of law occurring at the trial and excepted to by the defendant, and also newly discovered evidence, and assigns the overruling of the motion as error. All of the questions except that in relation to newly discovered evidence we think have been sufficiently detailed.

22. The Civil Code was so amended by the General Laws of Oregon, 1915, page 96, as to allow an appeal from an order setting aside a judgment and granting a new trial; but an order denying a motion for a new trial is not an appealable order. The amendment referred to does not apply to criminal actions: *State v. Pender*, 72 Or. 94, 109 (142 Pac. 615). The amendment of this Section 548, in 1915, did not change the statute in this respect. Hence, we cannot consider this motion. An examination of the affidavit for a new trial, however, leads us to believe that the court in no way abused its discretion in the matter.

23. Complaint is made that some of the account-books which were exhibits in the case were removed from the courtroom during the argument. It appears that they were returned and an offer was made by the counsel for the state to have them sent to the jury while they were deliberating, but objection being made by defendant's counsel they were not so disposed of. We find no exception taken in regard to the matter or any ruling made by the court. It does not appear that the defendant was in any way prejudiced.

Finding no error in the record, the judgment of the lower court must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and BENNETT, JJ.,
concur.

Rehearing denied November 12, 1919.

PETITION FOR REHEARING.

(184 Pac. 848.)

Messrs. Weatherford & Wyatt, Mr. Whitten Swafford and Mr. William P. Lord, for the petition.

Mr. Arthur Clarke and Mr. L. L. Ray, contra.

Department 2.

BENSON, J.—24. With but one exception, the points upon which the correctness of the original opinion herein is challenged, were presented fully upon the former argument, and received our careful consideration, and our views thereon remain unchanged.

For the first time, our attention is now called to a provision found in Section 7 of Chapter 3 of the Bankruptcy Act of 1898, 30 U. S. Stats. 548, which after reciting various duties of the bankrupt, directs that he shall

“submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.”

It is now urged that it was error to admit any evidence of what was said by the defendant in relation to the check in controversy, when upon the witness-stand before the referee in bankruptcy, by reason of the above statute. The obvious purpose of the statutory provision is to obtain from the bankrupt a full and frank history of his past business transactions, and at

the same time remove any justification for a refusal to answer in relation thereto, upon the ground that his evidence might tend to convict him of a crime. Our view in this respect is confirmed by the cases which are cited by appellant in his brief upon rehearing. It follows, therefore, that the statute does not and cannot apply to the language and acts of a bankrupt, who, in the course of his examination upon the witness-stand, commits a fresh crime, such as perjury, or the uttering of a forged instrument. Any other interpretation would make it folly to administer an oath to a bankrupt as a preliminary to his giving evidence in such a proceeding, and would, in effect, nullify the statute denouncing perjury. This conclusion is directly supported by *Glickstein v. United States*, 222 U. S. 139 (56 L. Ed. 128, 32 Sup. Ct. Rep. 71), and *Cameron v. United States*, 231 U. S. 710 (58 L. Ed. 448, 34 Sup. Ct. Rep. 244, see, also, Rose's U. S. Notes). The petition for rehearing is therefore denied.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued October 8, reversed and remanded November 12, 1919.

NAFTZGER v. HENNEMAN.

(185 Pac. 233.)

Appeal and Error—Findings of Fact on Conflicting Evidence Conclusive.

1. A verdict in favor of plaintiff settles every contradicted fact in favor of plaintiff, and precludes any examination on appeal as to the weight of testimony.

Frauds, Statute of—Sales of Personalty—Action for Price.

2. If buyer, after inspecting onions in a bin, agreed to take them as they ran without sorting, and designated the place where

they were to be delivered and the agent to take them in charge at that place, they became at that moment defendant's property, and the statute of frauds does not apply in an action by the seller for the purchase price.

[As to when goods remaining in custody of seller as same third person deemed to have been recovered by buyer within exception to statute of frauds, see note in 4 A. L. R. 902.]

Sales—Delivery.

3. If buyer, after inspecting onions in a bin, agreed to take them as they ran without sorting, and designated the place where they were to be delivered and the agent to take them in charge at that place, and the onions were so delivered, they became at that moment defendant's property.

Sales—Right to inspect.

4. Where buyer inspected onions when he purchased them, he was not entitled to again inspect them, in the absence of a claim that seller attempted to deliver other onions.

Sales—Action for Price—Instructions.

5. In an action for the purchase price of onions, which defendant denied that he accepted, it would have been error to instruct that plaintiff could not recover, unless defendant promised to pay therefor the "specific sum of \$674.40," as such instruction would require the jury to find for the defendant if it appeared upon the trial that the price agreed upon had been a dollar less or a dollar more than \$674.40.

Trial—Instruction Defective in Part Properly Refused.

6. Where a requested instruction contains an erroneous proposition, the court is not bound to separate the chaff from the wheat, and give that part of the request which states the law correctly.

Sales—Right to Inspect After Delivery.

7. Where buyer of onions inspected them in a bin, and agreed to buy them in certain grades at certain prices, seller to deliver them sorted and graded, buyer was entitled, after delivery, to a reasonable time to inspect and ascertain whether the onions had been so sorted and graded.

Sales—Failure by Seller of Performance.

8. If seller failed to deliver sorted and graded onions, and that was the agreement, he failed to perform, and could not recover the purchase price, unless the onions as delivered were accepted by the buyer or his agent as performance.

Sales—Action for Price—Unsubstantial Variance Will not Relieve Purchaser.

9. A slight, unsubstantial variance in quality of onions contracted to be delivered would not relieve the purchaser from payment.

Trial—Misleading Instructions.

10. In action for purchase price of onions, where the evidence was in conflict as to the terms of the contract, delivery and accept-

ance, it was misleading to instruct as to substantial performance, slight or partial dereliction, and effect of delivery by seller of property to third person, etc.; there being no question of substantial performance, or partial dereliction, or intent of seller to repudiate or transfer the property to a third person.

Sales—Tender of Goods—Compliance With Agreement.

11. While tender of goods "entirely different" from those contracted for would justify a rescission, it would be erroneous to instruct a jury that a purchaser is not justified in refusing to perform his contract and pay for the goods tendered, unless they are "entirely different" from those contracted for.

Appeal and Error—Sales—Misleading Instructions.

12. In an action for purchase price of onions, an instruction likely to give a jury the impression that a purchaser was not justified in refusing to perform his contract and pay for goods tendered unless they were "entirely different" from those contracted for was misleading and prejudicial.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

This is an action to recover for the price of onions alleged to have been sold and delivered to defendant. The complaint alleges that on and between the 10th and 20th of December, 1917, the plaintiff, at the instance and request of defendant, sold and delivered to defendant certain goods, wares and merchandise, to wit, onions, of the value of \$674, which sum defendant agreed and promised to pay.

The answer was (1) a general denial, (2) a plea of the statute of frauds, in that there was no note or memorandum of the transaction signed by defendant, as required by Section 808, L. O. L., and that defendant did not receive any part of the goods or pay any part of the purchase price therefor.

For a further defense defendant alleged:

"That on or about the 20th of October, 1917, defendant agreed with plaintiff that defendant would purchase from plaintiff all of his certain onions which would grade up to a certain standard, to-wit: that they should be of a certain size, known to the trade as

'medium,' and that they should be delivered to defendant within a reasonable time; that for all of such onions so graded and delivered, defendant agreed to pay plaintiff at the rate of two cents (2c) per pound.

"That thereafter and on or about December 20, 1917, plaintiff informed defendant that he, the plaintiff, was ready to deliver said onions, but defendant on inspecting them, found them to be not of the grade specified, and to contain sprouts and decay, and thereupon notified plaintiff that he, the said defendant, would not accept said onions.

"That plaintiff has failed and neglected to deliver to defendant onions as specified and still refuses and neglects to do so."

By way of counterclaim defendant reiterated the allegations contained in the second separate defense, and further alleged that he had loaned plaintiff 334 sacks of the value of \$50, in which to sack said onions; that he had demanded of plaintiff the return of said sacks or payment of their value, and that plaintiff had failed to pay for or return the sacks. There was a prayer for judgment for \$50.

The new matter having been put at issue by appropriate denials, the case came on for trial before a jury. The plaintiff introduced evidence tending to show that the onions in question had been stored in bins, one above the other, and that previous to closing the sale the defendant had examined the onions and offered plaintiff \$2.35 a sack for the onions, graded to one and one half inches in diameter and \$1.50 a sack for the smaller ones; that plaintiff refused to sell the onions graded at that price, on the ground of inability to obtain help to do the grading, and offered to sell them "just as they ran," meaning without grading them, at two cents per pound. The offer also required that defendant should furnish the sacks. And it was

required by the defendant that the onions were to be delivered at the warehouse of the Oregon Electric Railroad Company at Waconda; that subsequently defendant called plaintiff up over the telephone and accepted his offer and sent the sacks, whereupon plaintiff sacked the onions, throwing out decayed and rotten ones, and took them to the Waconda warehouse and had them weighed and delivered the weight slips to Mr. Harris, who defendant admits was his agent. Harris, according to plaintiff's testimony, took the weight slips and told plaintiff that defendant would send him a check for the money when he received them. Two days after, according to Harris' testimony, he examined the onions and found them unsorted and containing rotten and spoiled onions and dirt, and so informed defendant, who thereupon refused to pay for them.

There was a sharp conflict of testimony in regard to the condition of the onions when sacked, defendant's testimony tending to show that they were in bad condition, sprouted and dirty, and plaintiff's testimony tending to show that they were sound and in fair condition, and fully complying with the terms of the contract, as stated by plaintiff. There was also a conflict as to the terms of the contract, defendant denying plaintiff's version of it and contending that the onions were to be sorted and graded, and that he was to pay \$2 a sack for the best grade, which were to be at least one and three quarter inches in diameter, and that those of a smaller size were to go in a separate grade at \$1.25 a sack.

There was a jury trial and a verdict and judgment for plaintiff, from which defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Oglesby Young* and *Mr. John R. Turner*, with an oral argument by *Mr. Young*.

For respondent there was a brief and an oral argument by *Mr. Walter C. Winslow*.

McBRIDE, C. J.—1. Were we sitting as triers of the facts in this case, there would be ample room for diversity of opinion as to the actual terms of the contract between the parties; but the verdict of the jury in favor of plaintiff settles every contradicted fact in favor of plaintiff and precludes any examination as to the weight of testimony, therefore, if the court's instruction properly stated the law, we must assume the following facts to be settled: (1) That defendant examined the onions and made an offer, which was refused by plaintiff; (2) that subsequently he accepted plaintiff's offer to sell them as they run, i. e., without grading or sorting, at \$2 a sack, and furnished the sacks and instructed plaintiff to deliver the onions in sacks furnished by him, at a warehouse designated by plaintiff at Waconda; that plaintiff did furnish the identical onions theretofore inspected by plaintiff in the sacks furnished by him at the warehouse designated by defendant and delivered the weight slips to defendant's agent, who accepted the same without question and told plaintiff that he would forward them to plaintiff, who would send him a check for the amount due.

2, 3. While, as before stated, these facts are disputed by defendant's testimony, the verdict of the jury makes them conclusive upon us, subject to the exception above mentioned, and we think they establish such an inspection, acceptance and subsequent delivery as

takes the case out of the statute of frauds. If defendant, after inspecting the onions in the bin, agreed to take them as they run without sorting and designated the place where they were to be delivered and the agent to take them in charge at that place, and the onions were so delivered, they became at that moment defendant's property, and if, before they were shipped to Portland they had greatly increased in price and plaintiff had taken them away, defendant could have maintained replevin to recover them or could have recovered damages for the unlawful taking.

4. Considering the testimony introduced by plaintiff as true—as we must after verdict—defendant had inspected the onions before delivery, and as it is not claimed that different onions were delivered at defendant's warehouse, he was not entitled to again inspect them. In fact, plaintiff's testimony tends to show an acceptance by defendant's agent, which left nothing further to be done beyond the mere payment by defendant of the purchase price. The motions for a nonsuit and a directed verdict were, therefore, properly overruled.

5, 6. Defendant assigns as error the refusal of the court to give the following requested instruction:

"But, on the other hand, if the plaintiff has failed to prove by preponderance of the evidence that the goods were delivered to and accepted by the defendant, and that the defendant promised to pay therefor the specific sum of \$674.40, then your verdict should be for the defendant, and the court instructs you that to constitute a delivery and acceptance within the meaning of the law, there must be some act on the part of the purchaser plainly recognizing the existence of the contract and that the property has been received in accordance thereof. There must be a delivery of the goods by the seller with the intention of vesting

the right of possession in the buyer, and there must be an actual receiving and acceptance by the buyer with the intention of taking possession as owner."

The request in the main correctly states the law. The vice of it is the reference to the "specific sum of \$674.40." If it had appeared upon the trial that the price agreed upon had been a dollar less or a dollar more than \$674.40, the jury, had the court given the instruction as requested, would have been required to find for the defendant. This, of course, is not the law and where a requested instruction contains an erroneous proposition, the court is not bound to separate the chaff from the wheat and give that part of the request which states the law correctly.

Error is predicated upon the giving by the court of instructions 6 and 7, which are as follows:

"In this case the defendant seeks to avoid the sale, or contract for sale, upon the ground, as he contends, that the onions in question should have been delivered free from sprouts and decay, and of a certain size known to the trade as medium, and that no such delivery was made. You are instructed that if you find from the evidence in this case that there was a delivery and acceptance of the onions, that thereafter the defendant could not avoid the contract; that under these circumstances his only remedy would be to charge against the purchase price the amount of his damage caused by virtue of the fact that the onions delivered were not in accordance with the contract, if such were the case, and by giving you this instruction I do not mean to intimate that such was or was not the case, because that, of course, is a question of fact for you to determine from the evidence as you find it.

"As I have said, the defendant is attempting to avoid the contract of sale, and in reference to that matter you are instructed that the buyer may avoid the contract of sale when there has been a breach of the contract, or of a condition thereof, by the seller,

providing the breach is in some substantial particular which goes to the essence of the contract and renders the defaulting party incapable of performance, or makes it impossible for him to carry out the contract as intended. Every slight or partial dereliction of one party will not entitle the other to abrogate the contract. The conduct of the seller must be such as to show a disposition or intent to repudiate the obligation of the contract, as where the seller disposes of the property to a third person, delivers something entirely different from that intended to be delivered, or refuses to adhere to the original terms of the contract."

7, 8. To properly appraise the relevancy of these instructions, it will be necessary to consider the pleadings and evidence. That a contract for the purchase of plaintiff's onions was negotiated between the parties is admitted both by the pleadings and the testimony. Aside from the question of the statute of frauds, the controversy between the parties is not one where a contract of purchase is wholly denied, but goes to the terms of the contract, plaintiff claiming that defendant was to take the onions "as they run," that is, in the condition in which he found them in the bins, plus sacking and delivery, and defendant, on the other hand, contending that they were to be sorted and graded before delivery. There is no contention that the onions were not delivered at the place designated or within the time designated, the sole difference between the parties being in relation to the sorting and grading. If the contract was, that plaintiff was to deliver to defendant onions sorted and graded, defendant was entitled, after delivery at the warehouse, to a reasonable time after such delivery to inspect and ascertain whether the onions had been so sorted and graded. On the other hand, if the transaction was as plaintiff states it, defendant was not entitled to a second in-

spection, in the absence of a pleading indicating that plaintiff had attempted to deliver to defendant other onions than those previously inspected by him, if such inspection was in fact made. If defendant contracted for onions graded and sorted, he was not bound to accept and pay for onions unsorted and ungraded. It is not a question as to the rescission of a contract, but of performance. If plaintiff failed to deliver sorted and graded onions, and that was the agreement, he failed to perform and cannot recover unless what he did place in the warehouse was accepted by defendant or his agent as performance.

9. Of course a slight unsubstantial variance in quality would not relieve the purchaser from payment, the rule being in many respects the same in cases where nonperformance is urged, as in cases where rescission is attempted.

10. We think instruction No. 7, above quoted, was erroneous as applied to this case. The testimony as to acceptance and inspection was conflicting. The testimony as to what was said and done by Harris, defendant's agent, at Brooks was conflicting; the jury had a right to find either way, both as to the terms of the contract, the delivery and the acceptance, and while the text of Cyc., which forms the body of the instruction, is correct, the incorporation therein of specific instances wherein a variation from the contract had been held substantial was calculated to mislead.

11, 12. To say to a jury that a purchaser is not justified in refusing to perform his contract and pay for the goods tendered unless they are "entirely different" from those contracted for, is not the law. While the tender of goods of that character would certainly justify a rescission, it does not follow that the variation must always go to that extent, and yet a jury

would be likely to get that impression from the language used. Onions unsorted and ungraded and mixed with dirt and refuse are not "entirely different" from good, clean, graded onions, but a party who contracts for the latter quality is not required to treat a tender of the former as a performance of the contract.

For this error, which is the only one occurring in the trial, but which seems to be substantial we feel ourselves compelled to reverse the case and direct a new trial, and it is so ordered.

REVERSED AND REMANDED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued September 16, affirmed October 7, 1919.

KRUEGER v. BROOKS.

(184 Pac. 285.)

Adverse Possession—Evidence Showing Acquisition of Title by Adverse Possession.

1. In suit to quiet title, a survey having disclosed that a fence dividing the lands of the respective parties was located north of what would be the dividing lines in strict conformity with the description in their deeds, evidence held to show that plaintiff owned up to the fence in fee simple by force of adverse possession.

Pleading—Amendment of Misdescription in Complaint to Quiet Title Allowed.

2. In suit to quiet title, controversy arising out of fact that survey disclosed a fence was located north of the line between the two tracts of the parties as shown by the description of their deeds, where plaintiff intended to litigate the strip in dispute, but by mistake misdescribed the tract, it was proper for the court to permit him to file an amended complaint; defendant not being surprised.

Quieting Title—Equity has Jurisdiction of Suit by Party in Possession.

3. Equity had jurisdiction of a suit to quiet title, brought by a party in possession of the land in dispute, since he could not prosecute an action in ejectment, and in the suit he had a right to have title adjudicated.

Appeal and Error—Refusal to Permit Filing of Amended Answer Harmless.

4. Where the answer which had been filed in suit to quiet title permitted defendant to offer all evidence which would have been admissible under any issues raised by a proposed amended answer, refusal to permit defendant to file such answer was harmless to defendant.

Adverse Possession—Amended Complaint Sufficient to Sustain Decree Based on Adverse Possession.

5. In suit to quiet title, amended complaint *held* to have alleged ownership or title by adverse possession and to support decree for plaintiff.

Adverse Possession—For Requisite Period Vests Title.

6. Adverse possession for the requisite period vests title in the possessor of a tract of land by operation of law.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is a suit to quiet title. A trial resulted in a decree for the plaintiff W. C. Krueger. The defendant Carl O. Brooks appealed.

The litigants own and occupy adjoining tracts of land. The controversy arose out of the fact that when a survey was made it was discovered that a fence, which for considerably more than ten years had divided the lands as used and occupied by the litigants, was located between about 29 and 33 feet north of what would be the dividing line between the two tracts if a line were drawn upon the ground in strict conformity with the descriptions in their respective deeds.

Frederick Schleuter homesteaded and acquired title to the following described premises: The southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of Section 6 in township 1 north of range 1 west of the Willamette Meridian, containing eighty acres. For convenience the land just described will be referred to as Tract A. Afterwards Schleuter conveyed to Charles Krueger

and subsequently on September 15, 1909, the latter deeded to his son W. C. Krueger, the plaintiff.

Thomas Jeff Brooks homesteaded a tract of land of which the following described premises are a part: The south half of the northeast quarter of the northwest quarter of section 6, township 1 north, range 1 west, Willamette Meridian. For the sake of brevity the land included in this description will be designated Tract B. On August 27, 1915, Thomas Jeff Brooks deeded Tract B to his son Carl O. Brooks, the defendant.

In 1882, Charles Krueger moved on to Tract A with his family and resided there at least until the conveyance to the plaintiff. The uncontradicted evidence is that in 1882, there was a brush fence separating the premises occupied by Charles Krueger and the adjoining lands on the north; but the brush fence was subsequently destroyed by fire, and soon after the fire a new fence was built by Thomas Jeff Brooks and Charles Krueger, each building one half of the fence. This new fence was constructed practically along the line of the brush fence, although the new fence may have varied eight or ten feet one way or the other from the line of the old brush fence. The exact date of the construction of this new fence is uncertain, but it is accurate to say that it was built at some time between 1888 and 1893. While the new fence was repaired from time to time and, as we understand the record, was rebuilt a number of years ago, nevertheless a fence has been maintained without interruption along the identical line where what we here term the "new" fence was originally built at some time between 1888 and 1893.

In 1882 there was growing brush along and on the south side of the brush fence; but during the suc-

ceeding years the growing brush was slashed and the ground was gradually cleared by Charles Krueger and the plaintiff until all the land lying south of and up to the fence which could be tilled was cultivated, with the exception of about an acre and a half which lies in the northeast corner in a canyon and cannot on that account be cultivated. The land south of the fence was cultivated up to a part, and probably most, of the length of the fence for a period of more than twenty years prior to the commencement of this suit. At any rate Charles Krueger used all the land south of the fence from the time of its original construction until 1909, when he conveyed to his son; and the latter continued to use the land for the purposes for which it was adapted.

In about 1912, Thomas Jeff Brooks caused the lands described in his homestead patent to be surveyed and it was then discovered that the fence was located from about 29 to 33 feet north of where his south line would be if established upon the ground in exact accordance with the description in his patent. Apparently nothing was done by Thomas Jeff Brooks or his son towards claiming this narrow strip of land until about 1915, when the defendant "put boards in there * * for the fence, over on the line,—put boards and some posts about one fourth of the way through."

The plaintiff had a survey made of Tract A and of the controverted strip and thus ascertained the description by metes and bounds of the land lying south of the fence. The following is a description of all the lands south of the fence as it has been continuously maintained since the time it was built about thirty years ago: Commencing at a point 20 feet south 89 degrees 32 minutes west of the center of section six (6) in township one (1), north of range one (1), west

of Willamette Meridian and running thence south 89 degrees 32 minutes west 1,298.25 feet; thence north no degrees 7 minutes east 1,340.53 feet; thence north 89 degrees 37 minutes east 1,307 feet; thence south no degrees 28 minutes west 1,338 feet to the point of beginning. For convenience this description will be called Tract C; and for brevity the disputed strip of land will sometimes be called Tract D. It must be kept in mind that Tract C embraces the north half of Tract A and also the whole of tract D. The section, as will be observed from the measurements, is an irregular one.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Cicero M. Idleman*.

For respondent there was a brief over the name of *Messrs. Richards & Richards*, with an oral argument by *Mr. Norman S. Richards*.

HARRIS, J.—1. It is not necessary to state any additional facts or to relate any more of the evidence concerning the nature of the use which the plaintiff and his grantor made of the lands south of the fence; but it is enough to say that although the evidence in behalf of the plaintiff was contradicted by witnesses for the defendant, nevertheless, the record clearly shows that the plaintiff and his grantor have been in actual possession of and have used Tract D under claim of ownership for considerably more than ten years. The fact that all the land south of the fence was cleared and the fact that all the land south of the fence, which could be cultivated, was in truth cultivated up to the fence plus the fact that the fence was maintained as the dividing line for so many years is

the strongest kind of evidence that Charles Krueger as well as his successor, the plaintiff, claimed ownership in all the land south of the fence. In brief, the evidence shows that the plaintiff is the owner in fee simple of Tract D by force of a title acquired by adverse possession: *Gist v. Doke*, 42 Or. 225 (70 Pac. 704); *Dunnigan v. Wood*, 58 Or. 119, 125 (112 Pac. 531); *Stout v. Michelbook*, 58 Or. 372 (114 Pac. 929).

The principal attack made by the defendant in his printed brief is directed against the pleadings. The plaintiff filed a complaint and an amended complaint. Reducing the original complaint to the briefest terms it may be said that the plaintiff avers that he owned in fee simple and was at the time of the filing of the complaint in the possession of land, the description of which as given in the complaint corresponds with Tract A, and that he and his predecessor in interest had been in the adverse possession of such described land for more than thirty years; that the defendant "has a tract of land of which he is the owner * * adjacent to and extending along the north boundary line of plaintiff's said land. That the defendant without the consent of the plaintiff forcibly entered upon the plaintiff's said tract of land and has dug holes and erected fences upon the said tract of land * * thereby cutting off from plaintiff's said premises a strip of land 33 feet wide extending along the entire north side"; and that the defendant "claims an estate or interest in said tract or parcel of land (Tract D) adverse to plaintiff."

The defendant answered and admitted that the plaintiff owned Tract A and admitted that the defendant owned the adjoining tract on the north; but the defendant denied that he had entered upon the plaintiff's land as alleged in the complaint.

With the permission of the court the plaintiff filed an amended complaint. In paragraph II of his amended complaint the plaintiff avers that he owns in fee simple and is in possession of—

“that certain * * parcel of land * * described as follows”: (Here appears a description which corresponds with Tract A.)

This paragraph continues thus:

“That all of the northern part or portion of the land owned by the plaintiff (Tract C is here described) has been and now is used by the plaintiff and his predecessors in interest for pasturage and cultivation purposes for more than thirty years last past.”

Paragraph III avers that the plaintiff and his predecessors now and have been during all the time mentioned in the pleading—

“in actual, adverse, open, notorious, continuous, uninterrupted and peaceable possession of the following described parcel or tract of land, to wit: All of the northern part or portion of land owned by plaintiff and his predecessors in interest (a description of Tract C is here given). That all of the land so held as above set forth by the plaintiff and his predecessors in interest and his and their grantors has been and now is under fence and used by the said plaintiff and his predecessors in interest for pasturage and cultivation purposes for more than thirty years last past and said plaintiff and his predecessors in interest have paid all taxes and assessments levied and assessed on said tract or parcel of land to date.”

In paragraph IV it is alleged that the defendant owned a tract of land—

“adjacent to and extending along the north boundary line of plaintiff's said land. That the defendant without the consent of the plaintiff forcibly entered upon the plaintiff's said tract of land as hereinbefore described in paragraph III of this amended complaint

and has dug holes and erected fences upon the said tract of land extending across the entire north side of plaintiff's said tract of land, thereby cutting off from plaintiff's said described land a strip of land 33 feet in width extending along the entire north side of said land, thereby attempting to entirely exclude the plaintiff from the use of said strip of land. The said 33-foot strip belongs to the plaintiff and has been held and used in actual, adverse, open, notorious, continuous, uninterrupted and peaceable possession by the plaintiff and his predecessors in interest for more than thirty years last past as hereintofore alleged."

Paragraph V repeats the averment that Tract C has been inclosed by a fence for more than thirty years, "has been held in actual, open, adverse, notorious, continuous, uninterrupted and peaceable possession by this plaintiff and his predecessors in interest."

The defendant filed a motion against the amended complaint; but he answered when the court denied the motion. In his answer the defendant admitted that part of paragraph II which avers that plaintiff owned Tract A but denied the allegation that plaintiff had used Tract C for more than thirty years, denied paragraph III, admitted the averment in paragraph IV that the defendant owned the land adjoining plaintiff's premises on the north, and denied the remainder of the amended complaint.

The case came on for trial and the plaintiff proceeded to examine his first witness and thereupon the defendant objected to the introduction of any evidence on the grounds that: (1) A court of equity was without jurisdiction; and (2) "the complaint does not state facts sufficient to constitute a cause of suit." When this objection was overruled, the defendant immediately asked for permission to file an amended answer; but

the court denied the motion saying in explanation of the ruling,

“It is rather late to come in and ask for an amendment during trial, unless a very clear case is made out, and I doubt whether you have done that.”

The proposed amended answer contained some affirmative matter. In substance this affirmative matter states that the defendant owns Tract B and that the plaintiff owns an adjacent tract on the south which is described in the proffered pleading by metes and bounds. This description by metes and bounds of the land which the defendant alleges is owned by the plaintiff is in reality only another way of describing Tract A. It is then alleged that the true boundary line between the premises owned by the plaintiff and those owned by the defendant is a line drawn between Tracts A and B.

2. The defendant filed an answer to the original or first complaint and if the cause had been tried on those two pleadings the issue for trial would have related to a strip 33 feet wide extending across the north end of Tract A instead of a strip across the north end of Tract C. The defendant knew what the plaintiff was complaining about and he knew what the plaintiff was attempting to put in issue for trial. The defendant was not and could not have been surprised by the amendment. The plaintiff intended to litigate the 33-foot strip which was in dispute between the parties and the defendant could not have been misled as to the intention of the plaintiff. Instead of describing Tract C the plaintiff described Tract A. The plaintiff stated a cause of suit, but it is manifest that a clear mistake was made by the plaintiff and it was entirely proper in the furtherance of justice and on the authority of

many analogous precedents for the court to permit the filing of an amended complaint: *Baldock v. Atwood*, 21 Or. 73, 79 (26 Pac. 1058); *Koshland v. Fire Assn.*, 31 Or. 362, 365 (49 Pac. 865); *Farmers' Bank v. Saling*, 33 Or. 394, 404 (54 Pac. 190); *Christensen v. Nelson*, 38 Or. 473, 476 (63 Pac. 648); *Ridings v. Marion County*, 50 Or. 30 (91 Pac. 22).

3. The defendant argues that a court of equity is without jurisdiction. The plaintiff was in actual possession of all the land south of the fence when he began this suit. The evidence for the plaintiff was to the effect that he was and had been in possession of the disputed land. The defendant, when testifying as a witness, stated that he did not claim that he had been in possession of Tract D, but on the contrary he expressly admitted that the plaintiff had been in possession of all the land south of the fence. It is therefore admitted that the plaintiff was in possession. The plaintiff was not obliged to wait for the defendant to commence an action in ejectment. The plaintiff could not prosecute an action in ejectment, and consequently a suit in equity was the only remedy available to him; and having availed himself of the remedy afforded by a suit in equity he had a right to have the title adjudicated: *McLeod v. Lloyd*, 43 Or. 260, 276 (71 Pac. 795, 74 Pac. 491); *Comegys v. Hendricks*, 55 Or. 533, 534 (106 Pac. 1016). Indeed, a suit to quiet title would be a misnomer and no remedy at all if in the circumstances presented here, the plaintiff could not have his title tried out and determined. As was said by Judge DEADY in *Starr v. Stark*, 1 Sawy. 270, 276, Fed. Cas. No. 13,316, by a final decree—

“the title to the premises, as between the parties is determined, and all questions or matters affecting such title are concluded thereby.”

See, also, *Savage v. Savage*, 51 Or. 167, 170 (94 Pac. 182); *Moores v. Clackamas County*, 40 Or. 536, 540 (67 Pac. 662).

Most of the cases relied upon by the defendant were suits to establish boundary lines. This is not a suit to establish a boundary line; nor is it an attempt by a claimant out of possession to quiet his title as against a person in possession.

4. The defendant complains because the court refused to permit him to file his proposed amended answer. The amended complaint was filed on November 28, 1917; and an answer to this amended complaint was filed at some time not definitely disclosed by the record. The case came on for trial on March 27, 1918, and on that day the defendant offered to file the amended answer. It is not necessary to determine whether the alleged delay of the defendant alone justified the ruling of the court, for the reason that no substantial right of the defendant was injuriously affected. The answer which had already been filed permitted the defendant to offer all the evidence which could have been admissible under any of the issues which could properly have been raised by the proposed amended answer. It must, of course, be remembered that this is a suit to quiet title and the defendant could not convert it into a suit to establish a boundary line by the mere filing of an answer seeking the establishment of a boundary line. The defendant was permitted to tell the whole of his story about the controverted land and the decree of the trial court was rendered after hearing and considering all the evidence offered by both parties.

The amended complaint contains much unnecessary matter. It would have been enough if the plaintiff had alleged ownership and possession and that the de-

fendant claims an adverse interest, as taught in the following and other precedents: *Cooper v. Blair*, 50 Or. 394, 397 (92 Pac. 1074); *Savage v. Savage*, 51 Or. 167, 170 (94 Pac. 182); *Stanley v. Topping*, 71 Or. 590, 604 (143 Pac. 632); *Mascall v. Murray*, 76 Or. 637, 645 (149 Pac. 521).

The amended complaint sufficiently alleges that the plaintiff is in possession of Tract C. We think, too, that it can be said that the pleading avers that the plaintiff owns Tract C. In paragraph II is the averment "that all of the northern part or portion of the land owned by the plaintiff commencing at a point"; and then follows a description by metes and bounds of Tract C. Again, in paragraph III we find the allegation that "all of the northern part or portion of land owned by plaintiff and his predecessors in interest commencing at a point 20 feet"; and then there is a description of Tract C. The complaint avers in positive language that the plaintiff owns in fee simple and is in possession of Tract A.

5, 6. The averments of ownership are not, it is true, made with commendable directness, and yet, when taken in connection with the rest of the pleading, we think that it can be said that the plaintiff alleges that he is the owner of Tract C. Moreover, the pleading also recites the source of the plaintiff's title and alleges the probative facts upon which the claim of ownership is rested. The amended complaint sufficiently alleges ownership to support the decree and even though it be assumed that the pleader must allege the source and ingredients of his title, still it may fairly be said that the amended complaint sufficiently alleges title by adverse possession and the elements requisite for such title: 2 C. J. 259, and notes. No good purpose could possibly be served by remanding the cause for a new

trial, since it is fair to presume that a new trial would disclose no additional information and when too, it is apparent, as it is here, that a new trial would amount to nothing more than a second hearing of the same evidence which has already been once heard and from which it clearly appears that the plaintiff acquired a fee-simple title to Tract D in virtue of adverse possession. Adverse possession for the requisite period vested title in the possessor of Tract D by operation of law: *McKinney v. Hindman*, 86 Or. 545, 548 (169 Pac. 93, 1 A. L. R. 1476); *Parker v. Kelsey*, 82 Or. 334, 343 (161 Pac. 694); *Spath v. Sales*, 70 Or. 269, 273 (141 Pac. 160).

Upon the whole record we think that the decree of the trial court is correct and that the pleadings are sufficient to support the decree.

The decree is therefore affirmed. **AFFIRMED.**

BEAN, BURNETT and JOHNS, JJ., concur.

Modified as to costs November 12, 1919.

PETITION TO MODIFY.

(184 Pac. 288.)

Petition to modify decree as to costs allowed.

MODIFIED.

Mr. C. M. Idleman, for the petition.

Messrs. Richards & Richards, contra.

Department 1.

HARRIS, J.—In an opinion rendered recently, the decree from which the defendant appealed was affirmed. Nothing was said in the opinion about costs

and for that reason an affirmation of the decree would allow the respondent to recover his costs and disbursements from the appellant. The defendant has filed a petition asking that the decree be modified to the extent of disallowing costs to either party. The trial court refused costs to either party and directed each to pay his own disbursements. We think that under all the circumstances of this case each party should pay his own disbursements in this court. It is therefore ordered that the decree appealed from be affirmed without costs to either party in either court.

MODIFIED AS TO COSTS.

BEAN, BURNETT and JOHNS, JJ., concur.

Argued October 15, modified November 12, 1919.

SMITH v. MARTIN.*

(185 Pac. 236.)

Vendor and Purchaser—Assignment of "Contract"—Clause Prohibiting.

1. The parties to a contract for the sale of land could provide that it should not be assigned without the written consent of the vendor; a "contract" being an agreement between two or more parties, competent to contract, on a sufficient consideration, to do or not to do a particular thing which lawfully may be done or omitted.

Vendor and Purchaser—"Waiver" of Provision Against Assignment—Proof by Parol—"Waiver" Defined.

2. The vendor of land by contract stipulating against assignment without his written consent may waive, if he chooses, such provision of the contract for his benefit, and the "waiver," a voluntary relinquishment of one's known right by acts or by acceptance of benefits, may be proved by parol and circumstantial evidence as well as direct testimony.

*On validity and effect of stipulation in contract for sale of land against assignment by vendee without vendor's consent, see note in 35 L. R. A. (N. S.) 1064. REPORTER.

Pleading—Separate Defense Should be Complete in Itself.

3. The new matter in defendant's second defense should be sufficient in itself, independent of all other parts of the answer, to constitute a defense.

Pleading—Sufficiency of Separate Defense Referring to Other Defense for Matter of Inducement.

4. In ejectment by vendor of land against the assignee of the contract, second defense by defendant assignee, though referring to its first and separate answer, *held* sufficient; the reference being matter of inducement leading to the essential part of the defense grounded in waiver or estoppel.

Vendor and Purchaser—Pleading Waiver of or Estoppel to Enforce Stipulation Against Assignment Without Consent.

5. In a vendor's action of ejectment against the assignee of the contract, which stipulated against assignment without the vendor's written consent, second separate defense of the assignee, grounded in waiver of or estoppel to enforce the stipulation against assignment without written consent, *held* to state a good defense, either on the ground of waiver or estoppel, which merge into one another.

Estoppel—Vendor and Purchaser—Assignment of Contract—Waiver of or Estoppel to Require Vendor's Consent.

6. If the vendor of land, knowing that a company was about to purchase the contract from the vendee in ignorance of its requirement that the vendor's written consent be obtained, yet said nothing about the provision, and afterwards accepted the benefits of payments which the assignee company made, such vendor is prevented either on the ground of waiver or estoppel from subsequently insisting on the condition, at least without returning the payments.

Vendor and Purchaser—Assignment of Contract—Vendor not Entitled to Possession Against Assignee.

7. Where land was sold by contract stipulating against assignment without the vendor's written consent, the vendor cannot secure possession from an assignee of the contract without his consent on the ground that the waiver of the condition against assignment did not dispense with the stipulation of the contract against giving possession to an assignee without permission of the vendor, one of its conditions being that the purchaser was entitled to possession as long as he complied with the requirements as to payment, which right would pass by assignment of the contract.

Vendor and Purchaser—Assignment of Contract—Waiver of Written Consent to Assignment.

8. Evidence *held* to show waiver by the vendor of land in favor of the assignee of the contract of its provision requiring the written consent of the vendor to any assignment.

Specific Performance—Performance by Plaintiff—Necessity.

9. The court cannot decree specific performance by the seller of a contract for the sale of land, where the buyer's assignee, who asks relief, has not specifically performed and does not tender performance in full, but simply expresses its willingness.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

Claiming to be the owner and entitled to the possession thereof, the plaintiff instituted an action in ejectment against the defendant Martin to recover from him the possession of a certain lot described in the complaint. The Peninsula Security Company was substituted for and defended in place of Martin. Without denying the complaint in any respect, the company alleged, and it is admitted by the pleadings on behalf of the plaintiff, that the latter and his wife had contracted as parties of the first part to sell the property to G. D. Eatinger as party of the second part, for \$1,700, the initial payment to be \$100 and the remainder at the rate of not less than \$20 per month, with interest on the unpaid portion of the purchase price at 6 per cent per annum. It was stipulated in the writing that the purchaser be entitled to have and retain possession of the property so long as he kept up the payments promptly, and as a condition of the contract it is provided that:

“He will not assign or transfer this contract, nor deliver the possession of said premises to any person or persons whomsoever without the consent in writing of the said first party.”

The defeasance clause also states:

“Or in case the said party of the second part shall fail or refuse to comply with all or any of the conditions or agreements herein contained and by him to be performed, then and in such event this contract shall be void and thereupon said first party shall be entitled to the immediate possession of said premises.”

All payments were to be forfeited in case of such default and considered as rent for the use of the property.

The answer further says that Eatinger took possession of the property and that since then he and his assigns have been in possession, have promptly met the payments specified and have kept and performed all of the conditions of the contract. The defendant further alleges that Eatinger transferred and assigned to it all his right, title and interest in and to the contract; that it is now the owner and holder of the same, and that it is now in possession of the property and has leased it to the defendant Martin. The company further asserts that after the contract of sale was made, it was informed that there was an overdue mortgage on the premises, amounting to about \$1,200, and that it is now able, ready and willing to make all the payments specified by the contract and to pay off the mortgage and pay the plaintiff such sum as may be found due him, upon his giving to the company a deed to the premises free of all encumbrances.

As a separate defense the answer alleges that prior to the assignment of the contract to it by Eatinger the company directed the attention of the plaintiff to the fact that there were two mortgages on the premises, one of \$1,200 already mentioned, and another of about \$100 due to the Northwestern National Bank of Portland; that therefore the company, instead of making payments direct to the plaintiff should make payments on the mortgages, and that this was agreed to by the plaintiff, in pursuance of which and with the consent of the plaintiff, the company purchased the contract from Eatinger and has paid to the mortgagees all installments specified in the contract. The company claims not to have known anything about the provision of the contract requiring the consent of the plaintiff to its assignment; that the plaintiff, knowing of the defendant's ignorance on that subject and that it was

about to purchase the contract, permitted it to take over the agreement and make the payments to the mortgagees, and that it did purchase the contract in good faith, without knowledge of such provision against its assignment and relying on plaintiff's assent and agreement. It declares that it is able, ready and willing to pay to the plaintiff in cash such amount as may be found due under the terms of the contract after payment of the mortgages, on condition that he give to it a deed to the premises clear of all encumbrances, and an abstract showing fee-simple title in the plaintiff as specified in the contract, and that the company is able, ready and willing to perform the terms and conditions of the contract and make all payments required. Although the right to plead an equitable defense in an action at law was not questioned at any stage of this litigation, yet it may be of general interest to direct attention to Chapter 95, Laws of 1917, which sanctions such procedure.

The reply admits the making of the contract and that the company is leasing the property to the defendant Martin, and denies all other allegations of the answer except the corporate character of the answering defendant. The court heard the testimony on the issues thus formed and entered a decree in substance ordering the defendant company to pay to the plaintiff the sum of \$273.82 upon the furnishing by him and his wife an abstract showing the premises to be free and clear of all encumbrances except the first mortgage of \$1,200, and upon their executing a warranty deed to the company free from encumbrances except the mortgage and, further, that the action at law in the above-entitled cause for ejectment be perpetually enjoined. The plaintiff appeals. **MODIFIED.**

For appellant there was a brief over the names of *Mr. S. B. Huston* and *Mr. M. B. Meacham*, with an oral argument by *Mr. Huston*.

For respondent there was a brief over the names of *Mr. Omar C. Spencer* and *Mr. Perry C. Stroud*, with an oral argument by *Mr. Spencer*.

BURNETT, J.—1. A contract may be defined to be an agreement between two or more parties competent to contract, upon a sufficient consideration, to do or not to do a particular thing which lawfully may be done or omitted. Hence the parties could provide that the contract should not be assigned without the written consent of one of them. There was nothing unlawful or contrary to public policy in such a stipulation and under proper conditions the same may be enforced. There are instances where the personal qualities of one of the parties form an element of the agreement, as where the personal services of a physician or of an actor, or a tenant for a certain share of crops as rent, are involved. There, by operation of law the contract is not assignable without the consent of the employer. It is equally permissible for the parties to append the same condition by express contract, so that the inhibition against assignment arises from their covenant, rather than by operation of law. For instance, in *Behrens v. Cloudy*, 50 Wash. 400 (97 Pac. 450), a lease contained covenants of the lessor to sell the land to the lessee in eight months at the latter's option, and also the covenant of the lessee not to assign any part of the lease. The plaintiff had taken an assignment of the option without a written consent as required by the contract, and sued to compel specific performance. The court held that the covenant

against the assignment was lawful and that the purchaser without written consent acquired no rights. In another Washington case, *Bonds-Foster Lumber Co. v. Northern Pacific R. R. Co.*, 53 Wash. 302 (101 Pac. 877), it is laid down as a rule that:

“One who accepts assignment of a contract which by express terms is made nonassignable, acquires only a cause of action against the assignor.”

See, also, *Burck v. Taylor*, 152 U. S. 634 (38 L. Ed. 578, 14 Sup. Ct. Rep. 696, see, also, Rose's U. S. Notes); *Tabler v. Sheffield Land Co.*, 79 Ala. 377 (58 Am. Rep. 593); *Deffenbaugh v. Foster*, 40 Ind. 382; *Andrew v. Meyerdirck*, 87 Md. 511 (40 Atl. 173); *City of Omaha v. Standard Oil Co.*, 55 Neb. 337 (75 N. W. 859); *Zetterlund v. Texas L. & C. Co.*, 55 Neb. 355 (75 N. W. 860).

2. In such contracts as the one we have before us, the provision against assignment without the consent of the seller is made for his benefit and, like all other provisions in favor of a party, he may waive it if he chooses. Such waiver may be proved by parol and by circumstantial evidence, as well as by direct testimony. In *Schmurr v. State Ins. Co.*, 30 Or. 29 (46 Pac. 363), a policy of insurance required that all waivers of its provisions should be in writing, but the court held that even this condition could itself be waived, and said in substance that where a company has full knowledge of facts that render void one of its policies, retains the premium and fails to cancel the policy, it waives the forfeiture, and this can be done by conduct or by parol, although the policy itself provides that it shall be in writing. “Waiver” is a voluntary relinquishment of one's known right, and may be by the acts of the party or by accepting benefits accru-

ing on account of that waiver: *Maday v. Roth*, 160 Mich. 289 (125 N. W. 13, 136 Am. St. Rep. 441); *Peters v. Canfield*, 74 Mich. 498 (42 N. W. 125); *Francis v. Litchfield*, 82 Iowa, 726 (47 N. W. 998); *Ross v. Page*, 11 N. D. 458 (92 N. W. 822).

3-5. The plaintiff contends, however, that the second further and separate defense interposed by the Security Company taken alone without reference to the first defense is unintelligible and furnished no ground of resistance to the plaintiff's complaint. He argues that the new matter in the second defense should be sufficient in itself, independent of all other parts of the pleading, to constitute a defense. In principle this is true, but, as stated in *Casner v. Hoskins*, 64 Or. 254 (128 Pac. 841, 130 Pac. 55):

"The general rule is that a separate defense should be complete within itself and contain all the averments necessary to answer the entire cause of action set forth in the complaint or such part thereof as is intended to be controverted: *Gardner v. McWilliams*, 42 Or. 14 (69 Pac. 915); *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801, 99 Am. St. Rep. 724). In the construction of pleadings as in the interpreting of other writings, the maxim, 'That is certain which can be rendered certain,' applies, and where one part of an answer, for the purpose of avoiding reiteration of facts alike applicable to the other parts of the defense, refers to such part where the matter to which attention is thus attracted is sufficiently set forth, the allusion is a compliance with the requirements of the statute that the language employed in an answer shall be concise and without repetition: 1 Ency. Pl. & Pr. 853; *Sutherland v. Phelps*, 22 Ill. 91."

The defense in question reads thus in part:

"That subsequent to the making of the contract of sale, set forth in paragraph II of the defendant's first and separate answer, and prior to the assignment of

the said contract, which was made by said Eatinger on July 14, 1917, to the Peninsula Security Company, and is set forth in paragraph IV of the defendant's first and separate answer, the defendant, Peninsula Security Company, called the plaintiff's attention, on July 12, 1917, to the fact that there was both a first and second mortgage on said premises. * * "

This is matter of inducement leading to the essential part of the second defense, which is grounded in waiver or estoppel, and under the authority of *Casner v. Hoskins*, 64 Or. 254 (128 Pac. 841, 130 Pac. 55), was sufficiently pleaded. The further contention of the plaintiff is that waiver was not alleged and that the statement in the defense under consideration did not amount to an estoppel. It is true that the word "waiver" is not mentioned in the answer, but it is stated therein:

"That the said plaintiff is estopped from now asserting this provision of the contract of sale against assignment without consent in writing, in this: that pursuant to said plaintiff's consent and agreement, the defendant Peninsula Security Company, not knowing that consent to the assignment should be first obtained in writing and relying on plaintiff's consent and agreement, purchased said contract and has made all payments specified by the contract of sale to the mortgagees and the said Peninsula Security Company, relying on said consent and agreement of the plaintiff, has kept and performed all other terms and conditions of said contract of sale; that it would now prejudice the defendant, Peninsula Security Company's interests to permit the plaintiff now to assert the clause in the contract of sale against the assignment unless plaintiff's consent was first obtained in writing."

It is not the name given to the matter averred, but the legal effect to be drawn from the facts stated, which gives force to the pleading. The pleader may

put a wrong label upon his statement of his cause of action or defense, yet the court will consider the pleading according to its legal effect without reference to the title it bears. It is sometimes difficult to distinguish between estoppel and waiver. The waiver of the terms of a contract may be made the subject of a still further contract between the parties, and in that case as in any other agreement there must be a consideration and subject matter, and the assent of both contracting parties. But, as already shown, the waiver may result from the conduct of the party for whose benefit the stipulation said to have been waived was made in the first instance. The distinction is thus pointed out by Mr. Justice McBRIDE in *Mitchell v. Hughes*, 80 Or. 574 (157 Pac. 965):

“Where there is no intention to waive, there is no waiver, unless the conduct of the alleged waiver is such as to have misled the waivee to his prejudice. ‘Waiver involves both knowledge and intention; an estoppel may arise when there is no intention to mislead. Waiver depends upon what one himself intends to do; estoppel depends upon what he caused his adversary to do.’ ”

And it is said in 40 Cyc. 261:

“The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby.”

The principle is thus stated by Judge SANBORN in *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 435 (43 C. C. A. 270, 278):

"But a waiver is either the result of an intentional relinquishment of a known right, or an estoppel from enforcing it. To constitute a waiver there must be an intention to relinquish the right, or there must be words or acts calculated to induce the other contracting party to believe and which deceive him into the belief that the holder of the right has abandoned it; and the party deceived must have acted on his belief, so that an assertion of the right will inflict upon him a loss he would not have sustained if its holder had not appeared to relinquish it."

These excerpts support the doctrine that waiver or estoppel does not necessarily depend upon the affirmative intention of the waivor, but that in the alternative it may be grounded upon his conduct which misleads the other party into doing something which will inure to his own hurt if the waivor is allowed to repudiate the transaction. Thus it seems that waiver and estoppel largely occupy common ground or shade into each other.

6. It is urged also by the plaintiff that a contract required by the statute of frauds to be in writing cannot be waived verbally, as this would be substituting an oral contract for what the law says must be written. This is correct if we contemplate waiver as grounded solely in contract and the doctrine is supported by 29 Am. & Eng. Ency. Law (2 ed.), 1101; but the text-writer there goes on to state:

"This is true even though the agreement or waiver may be in such terms that, taken alone, it would not be required to be in writing. The only ground upon which a party will be bound by such a waiver is that the other party has so governed his conduct by virtue of and relying upon the attempted waiver or alteration that it would be aiding a fraud to permit him to deny its validity."

Hence it is that if in fact the plaintiff, knowing that the company was about to purchase the contract in ignorance of the requirement that his written consent should be obtained, yet said nothing about that provision and afterwards accepted the benefits of the payments which the company made, it would prevent him from now insisting upon that condition, at least without returning the payments of which he enjoyed the benefit. It matters not whether we call it estoppel or waiver, the result is the same.

7. Again, the plaintiff makes the point that the waiver by the lessor of a condition in the lease against assignment without his written consent does not dispense with other conditions therein, meaning thereby that it does not override the stipulation against giving possession without such permission. We must, however, keep in view all the conditions of the contract, one of which was, as is seen expressed therein, that the purchaser was entitled to take and retain possession of the property as long as he complied with the requirements as to payment. This was a right given to the purchaser under the contract and would pass by the assignment of it. It is true that if the purchaser himself had kept up the payments and had given possession to another without assignment, this would have constituted a breach of the contract unless the plaintiff consented to it in writing or waived the same. On the other hand, an assignment of the contract would carry with it the right of possession, it being a case of the greater including the less, because the contract gives to the holder of it the right to possession.

8. Having in mind the principle that a stipulation against the assignability of a contract is lawful and enforceable, but that it may be waived by the party for whose benefit it was made, we direct attention to

the testimony on the subject. Mr. Drinker, the president of the company, stated that Mr. Eatinger, the original contractor for the purchase of the property, opened negotiations with him, exhibited to him a copy of the contract and sought to have him take it over and assume its obligations; that he arranged for an interview with the plaintiff at the Northwestern National Bank, at which he told the plaintiff of Eatinger's request for the defendant company to take over his equity in the contract; that he had searched the records and found there were two overdue mortgages on the premises and that if the company took over the contracts it would not make the payments to him but would have to make them to the mortgagees until the encumbrances were paid off. He says that he offered to buy Smith's interest in the contract, but the latter declined to sell. He then continues:

"Mr. Smith then said he would not discount the contract, but that he would allow us to make payments to the mortgagees, with the understanding that the second mortgage to the Merchants' National Bank was to be paid off first; and then we were to start making payments on the first mortgage."

Drinker also testified to having made certain payments on both mortgages. Another witness, Mr. Holbrook, an officer connected with the bank, narrates having arranged for the interview between Drinker and Smith, at which Smith declined to sell his interest in the property, and that Drinker then said:

"He would go ahead and pay out in accordance with the terms of his contract, and, in order to make certain that the payments would go direct to the mortgagees, he would pay them direct, and he then paid me \$20, which was the amount then due us on our mortgage, and I gave him a receipt for it.

"Q. Was that with the consent and agreement of Mr. Smith?

"A. It certainly was. He was right there, and consented to it, as far as I could see."

He declares that there was nothing said at that time about the requirement that an assignment should be in writing, and no objection was raised to the receipt of the money by him.

The plaintiff himself, speaking of the meeting at the bank, after relating that he declined to sell his equity in the property, testified about the conversation as follows:

"He [referring to Drinker] stated something to the effect that if I did not accept the discount on my equity, that they should continue the payments to the mortgagee, in protection to their interests in the contract, at which I answered I had no option; that is, I couldn't help myself.

"Q. Was there any agreement between you and Mr. Drinker at that time that this contract should be modified in any respect?

"A. Nothing whatever was said about modifying the contract."

It further appears from the testimony that after the defendant company had made some payments on the small mortgage, Smith paid the balance remaining due, receiving the benefit of the payments made by the company. He also admits that the sums paid on the larger mortgage were credited on the interest due thereon. The company took the assignment of the contract from Eatinger on the same day of the conversation at the bank.

It is very plain from this testimony that the company did not make the payments as a mere volunteer. While it cannot be excused for not reading the contract carefully, although Drinker says he looked it over hastily,

the conduct of Smith, even as narrated by himself, naturally leads to the conclusion that he did not intend to insist upon the enforcement of the condition requiring his written assent to an assignment of the contract. One would readily infer this from his statement that he had no option, and would be led to believe that he assented, albeit unwillingly, to the payments being made by the defendant to protect its interest in the contract. Moreover, he accepted the benefits of the unauthorized assignment, by receiving the credit for the payments made on the mortgages by the defendant company. As we view the testimony, the waiver of this condition on behalf of Smith is established and the company occupies the position of Eatinger, the original party to the contract.

9. The situation, then, is that the plaintiff has brought ejectment to recover possession of the property. He placed the other party to the contract in possession of the realty. Until there is a default in the performance of the covenants of the purchaser, his possession cannot be disturbed. Moreover, as the condition about the nonassignability of the contract was waived, its violation does not amount to a default. Hence the company, by its tenant, is in rightful possession as successor of Eatinger, which is sufficient to defeat the action of ejectment. On the other hand, the defendant does not tender performance in full. Neither has it entirely performed the covenants. Indeed, no tender is pleaded. It simply expresses its willingness to proceed. Under these circumstances, the court cannot decree specific performance by the seller, because the buyer has not specifically performed on its part. The decree will therefore be modified to the effect that the further prosecution of the instant particular action at law in ejectment shall be enjoined,

without prejudice to any new cause of action which may arise in favor of the plaintiff, respecting the realty in question, and without granting further relief to the defendants. Neither party shall recover costs from the other.

MODIFIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued September 24, modified and remanded November 25, 1919.

SIMPSON v. FIRST NAT. BANK.

(185 Pac. 913.)

Bills and Notes—Pleading in Action Against Bank as Alleged Indorser.

1. Action against bank to recover balance on bankrupt's note, in which note, prior to maker's bankruptcy, the bank, as agent for plaintiff, had invested her money, and which note had been delivered by bank to plaintiff without indorsement and with payee's name left blank, the complaint, averring that "plaintiff is entitled to the indorsement of defendant * * upon said note," and that the bank, on account of its negotiation and sale of the note to plaintiff, was liable as indorser, *held* to state a claim based on the note and not, upon any independent oral promise of guaranty or express warranty.

Pleading—Construction Against Pleader on Demurrer.

2. Upon demurrer to complaint, language of complaint must be construed most strongly against pleader.

Banks and Banking—Liability of Bank in Making Loans of Depositor's Money.

3. If a bank is authorized by a depositor to loan the latter's money, the bank for that purpose acts as an agent; and, if it lends the money in good faith and uses due diligence, it is not ordinarily liable for any losses that occur.

Guaranty—Necessity or Words Showing a Contract.

4. While the word "guaranty" is not essential to create a contract of guaranty, and the word "warranty" is not indispensable for the creation of an express warranty, and while there is no particular form or expression necessary to create a strict guaranty or a pure warranty, still the language employed by the parties must in some way indicate an intention to contract.

Bills and Notes—Transfer of Note With Blank Space for Payee's Name.

5. Under the law-merchant, when maker left a blank for name of payee and delivered the instrument in that condition to another person for value, the person to whom it was delivered, or any subsequent holder, could insert his own name or that of a transferee as payee.

Statutes—Construction of Negotiable Instruments Law.

6. Rules of law-merchant, while not controlling, are at least helpful when construing the negotiable instruments law.

Courts—Rules of Decision.

7. Opinion of court must be read in the light of the facts discussed by the court.

Bills and Notes—Prima Facie Authority to Fill in Blank Space.

8. Where maker gave bank a note leaving blank space for name of payee, and bank, without filling in blank space, transferred note to depositor whose money it had been authorized to loan out, depositor was a "person in possession" within Section 5847, L. O. L., giving "person in possession" *prima facie* authority to fill in blank, and had *prima facie* authority to fill blank by writing her own name or that of the bank.

Bills and Notes—Filling in Name of Payee in Blank Space.

9. Where maker gave bank a note leaving blank space for name of payee, with authority to bank to insert its own name, and bank, without filling in blank, transferred note to depositor, depositor's authority to fill in blank, under Section 5847, L. O. L., was limited to inserting name of bank, since the blank space under the statute must be filled in "strictly in accordance with the authority given."

Action—Transferee's Remedy in Compelling Transferrer to Indorse Note is in Equity.

10. Where bank, having received note from maker with authority to insert its name in blank space left for name of payee, transferred note without inserting name or indorsing it, transferee, upon inserting bank's name as payee, could not in action against bank on note, compel bank to indorse note; transferee's remedy being by suit in equity and not law action.

Action—Distinction Between Law and Equity Actions.

11. In Oregon the distinction between suits in equity and actions at law is preserved.

Appeal and Error—Remand of Case to Permit Plaintiff to Amend Complaint.

12. Under Section 390, L. O. L., as amended by Laws of 1917, page 126, where plaintiff, who in law action on note sought to compel defendant transferrer to indorse note, could so amend complaint as to entitle her to such relief in equity, Supreme Court in sustaining action of lower court in sustaining demurrer to complaint will remand cause with permission to plaintiff to amend complaint.

Bills and Notes—Compelling Indorsement of Note Transferred by Delivery.

13. Under Section 5882, L. O. L., and even in absence thereof, payee who transfers note for value without indorsing it can be compelled by transferee to indorse note.

Statutes—Construction of Negotiable Instrument Act.

14. Common-law precedents and discussions by text-book writers of the rules of the law-merchant are valuable in ascertaining the meaning of negotiable instrument act.

Bills and Notes—Rights of Transferee.

15. Under Section 5882, L. O. L., transferee of note is vested, not only with the equitable, but also with the legal, title although he cannot, until indorsement, be treated as a holder in due course.

Bills and Notes—Transferee's Right to Unqualified Indorsement.

16. Section 5882, L. O. L., giving transferee the right to indorsement of transferror, entitles transferee to, an unqualified indorsement unless the parties agreed that the indorsement should be qualified.

Equity—Completion of Note Transferred Unindorsed and With Blank Space for Payee's Name.

17. Where bank received note from maker with authority to insert its name in space left blank for name of payee, and transferred note without inserting name or indorsing note, bank knew that unless its name appeared as payee transferee could not compel payment by maker, and equity will hold that to be done which ought to be done, and direct the note to be completed in conformity with the intention of the original parties.

Appeal and Error—Presumption of Truth of Facts Stated in Complaint on Demurrer.

18. Supreme Court, in reviewing action of lower court in sustaining demurrer to complaint, will assume that the facts are as stated in complaint.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2.

The plaintiff is attempting to recover from the defendant the amount due on a promissory note on the theory that the bank is liable as an indorser to her, notwithstanding the fact that when she received the note from the bank the instrument contained an unfilled blank for a payee and the name of the bank did not appear in or on the note. The court sustained a demurrer to the amended complaint. The plaintiff

refused to plead further and thereupon a judgment was entered against her for the defendant's costs and disbursements. The plaintiff appealed.

Assuming, as we must, that the facts are as stated in the amended complaint, the history of the note sued upon is as follows: On August 15, 1907, the defendant, a corporation engaged in the banking business, loaned \$1,000 to Mrs. M. Josephson and she gave to the bank her promissory note, a copy of which follows:

"1000. Roseburg, Oregon, Aug. 15, 1907.

"Demand after date, without grace, for value received, I promise to pay to — or order One Thousand Dollars, with interest from date at the rate of 8 per cent per annum until paid, principal and interest payable in U. S. Gold Coin of the present standard value; and in case suit be instituted to collect this note, or any portion thereof, I promise to pay such additional lawful sum as the Court may adjudge reasonable, as attorney's fees.

"MRS. M. JOSEPHSON."

At the time of making the note the name of the payee was left blank, but, in the language of the complaint—"it was intended and authority was given therefor to insert the name of the defendant herein."

On September 19, 1907, the plaintiff had about \$1,200 on deposit to her credit in the bank and at that time the defendant through its officers suggested to her that she allow the bank to loan \$1,000—

"of said money on deposit and represented to the plaintiff that it would be loaned by them to absolutely responsible parties, and for such time that should plaintiff have use for said money that the same would be available to her at any time after thirty days.

"That thereupon the defendant, through its officers aforesaid, appropriated \$1,000 of said deposits belonging to plaintiff herein and negotiated, set over and assigned to the plaintiff the said promissory note of said

Mrs. M. Josephson. That neither said bank nor its officers had notified the plaintiff herein as to how they had so invested said \$1,000 for plaintiff until on or about the 1st of March, 1908, when plaintiff's bank-book was balanced and a voucher returned to her being the memorandum check made by said defendant bank showing that plaintiff was charged with said note of Mrs. M. Josephson."

The bank continued to hold the note for the plaintiff and "to attend to the collection of the same and of the interest thereon" until January, 1914, when the bank delivered the note to the plaintiff with the information that the instrument belonged to her; and it is proper to state, too, that the plaintiff never saw the note prior to January, 1914, the time when she received the instrument from the bank, although as already stated she was informed by the memorandum check returned to her as a voucher on March 1, 1908, that the bank had invested \$1,000 for her in the note of Mrs. M. Josephson.

Within a reasonable time after receiving the note from the bank the plaintiff "filled in the name of defendant as payee of said note." While the bank had possession of the instrument as the agent of plaintiff, defendant presented it, from time to time, to the maker for payment but no part of the principal was paid and only a portion of the interest was paid.

The maker of the note was adjudicated a bankrupt at some time prior to January, 1914, and while the defendant had possession of the note "as agent of said plaintiff." We infer from the complaint that the plaintiff presented the note to the trustee in bankruptcy; and it is affirmatively stated in the amended complaint that the claim "was duly allowed and said bankrupt estate paid as dividends to plaintiff on ac-

count of said note the sum of \$27.07 and no more." The plaintiff brought this action to recover \$1,356.44, the balance due after deducting payments of interest received from the maker of the note and the dividends paid by the bankrupt estate.

MODIFIED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief and an oral argument by *Mr. Oliver P. Coshov*.

HARRIS, J.—The amended complaint was framed upon the theory that the bank was liable as an indorser on the note. The pleading recites that when the note was executed the name of the payee "was left blank"; and that the instrument was still in that condition when the plaintiff received it. The pleader tells about writing the name of the defendant in the blank and then avers that—

The "plaintiff is entitled to the indorsement of the defendant herein upon said note and was at all times so entitled to the same."

Again, we read in the amended complaint an allegation that the defendant had notice of the failure of Mrs. M. Josephson to make payment "and of the fact that it was liable as indorser and on account of plaintiff being entitled to its said indorsement as of said date of making said transfer to plaintiff." The following brief averment is a concise statement of the theory upon which the pleading was based:

"That on account of said negotiation and sale aforesaid to the plaintiff herein of said note by said defendant as aforesaid, the said defendant is liable thereon as indorser as aforesaid."

1. The demand for judgment includes not only the principal and interest due on the note, but also the sum of \$100 which the plaintiff alleges is a reasonable sum to be allowed as attorney's fees for the collection of the debt. Obviously, the claim asserted by the plaintiff in her pleading is based on the note and not on any independent oral promise amounting to a guaranty or an express warranty.

2. Counsel for the plaintiff now contends, however, that the amended complaint states enough to show that the defendant is liable to the plaintiff even though it is held that the bank cannot be charged in this proceeding as an indorser. This contention proceeds upon the notion that the representations alleged to have been made by the defendant when its officers suggested that the plaintiff permit the bank to invest her funds for her amounted either to a guaranty that the bank would itself repay the lender if the borrower did not, or to an express warranty of the solvency of Mrs. Josephson: 5 C. J. 967. It may be conceded that the bank might be held liable upon a contract of guaranty or warranty if it made such a contract: *Kiernan v. Kratz*, 42 Or. 474 (69 Pac. 1027, 70 Pac. 506); *Swenson v. Stoltz*, 36 Wash. 318 (78 Pac. 999, 2 Ann. Cas. 504). The sufficiency of the pleading was tested by a demurrer; the plaintiff was content to stand upon her pleading notwithstanding the ruling of the trial court sustaining the demurrer; and consequently in this court, as in the trial court, when examining the amended complaint the language found in it must be construed most strongly against the pleader: *Darr v. Guaranty Loan Assn.*, 47 Or. 88, 93 (81 Pac. 565); *Fishburn v. Londershausen*, 50 Or. 363, 375 (92 Pac. 1060, 15 Ann. Cas. 975, 14 L. R. A. (N. S.) 1234).

3. The amended complaint does not state a cause of action arising out of any oral promise made by the defendant unless it can be said that the representations attributed to the officers of the bank amount to such a promise. If a bank is authorized by a depositor to loan the latter's money, the bank for that purpose acts as an agent, and if it lends the money in good faith and uses due diligence it is not ordinarily liable for any losses that occur: 7 C. J. 719. We cannot tell from a reading of the amended complaint whether the representations are to be taken merely as limitations upon the authority of the agent or were intended as a guaranty on the part of the bank to repay if the borrower did not or as a warranty of the solvency of the borrower, or otherwise. If the representations are considered as limitations upon the authority of the agent, the complaint fails to state a cause of action, for the reason that there are no appropriate allegations showing either bad faith or a lack of diligence on the part of the bank. For aught that appears in the pleading Mrs. M. Josephson may have been solvent on August 15, 1907, as well as in March, 1908, and even for a long time afterwards; and, indeed, it may be that at any time in 1907 or 1908 all persons would have considered the loan a safe and profitable investment. It is true that Mrs. M. Josephson was adjudicated a bankrupt, but it is also true that the pleading does not tell us when she became a bankrupt. The inferences to be drawn from the amended complaint are that the maker of the note was not adjudicated a bankrupt until some time after January, 1913. Manifestly, the pleading does not sufficiently state a cause of action arising out of any bad faith or neglect of the agent. Nor does the amended complaint contain enough to enable us to

say that it states a cause of action arising out of any fraud practiced by the bank.

4. While the word "guarantee" is not essential to create a contract of guaranty and the word "warrant" is not indispensable for the creation of an express warranty, and while there is no particular form or expression necessary to create a strict guaranty or a pure warranty, still the language employed by the parties must in some way indicate an intention to contract: 20 Cyc. 1412. See, also, : 40 Cyc. 493. The amended complaint does not contain enough to show either a contract of guaranty or an express warranty of the solvency of the borrower. In brief, the amended complaint does not state sufficient facts to make the defendant liable on account of any bad faith or neglect in loaning the money or on account of any fraud or on account of any contract of guaranty or warranty. We now come to the questions arising out of the theory of the plaintiff that the bank is liable on the note as an indorser of it.

When we seek to ascertain what rights, if any, the plaintiff may have arising out of the note itself, as distinguished from any cause of action that she may have on account of any oral promise made by the officers of the bank, we may with propriety make two inquiries: (1) What right, if any, can the plaintiff assert against Mrs. M. Josephson, the maker of the note? And (2) what right, if any, can the plaintiff claim and enforce against the bank.

5. Under the rules of the law-merchant when the maker of a note left a blank for the name of a payee and delivered the instrument in that condition to another person for value, as was done here, then the person to whom the note was delivered or any subsequent holder could insert his own name, or that of a

transferee, as payee. Some of the adjudications place the rule upon the ground of agency; some rely upon the theory of estoppel; and others rest their conclusions upon principles of both agency and estoppel. It is not now necessary to investigate the reasons supporting the rule, but it is enough to say that the delivery of a note with an unfilled blank for the name of a payee gave to a *bona fide* holder implied but absolute authority to fill the blank. Indeed, so absolute and unqualified was this implied authority, that even though the maker intrusted his note to an agent with directions to take it to A and if instead of taking it to A, the agent, contrary to the express instructions of the maker, took it to B and for value delivered it to B, then B had authority to insert his name as payee and as such could recover on the note from the maker, notwithstanding the fact that the agent never accounted to the maker for the funds received from B. Nor did it make any difference under the rules of the law-merchant, so far as concerned the right of B to recover from the maker, whether the agent inserted the name of B as payee before exhibiting the note to B or whether the instrument was delivered to B with the blank unfilled. The existence of a blank space for the name of a payee did not of itself put the holder on inquiry. Of course if at the time of the delivery of the note to B he had knowledge of the instructions given by the maker to the agent, B would not have been an innocent holder and a different rule would apply: *Thompson v. Rathbun*, 18 Or. 202 (22 Pac. 837); *Cox v. Alexander*, 30 Or. 438, 446 (46 Pac. 794); *Keyser v. Warfield*, 100 Md. 72, 81 (59 Atl. 189); *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236, 240; *Schooler v. Tilden*, 71 Mo. 580; *Seay v. Bank of Tennessee*, 3 Sneed (Tenn.), 558 (67 Am. Dec. 579); *Business Men's*

League v. Sragow, 153 N. Y. Supp. 231; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350 (112 N. W. 807, 124 Am. St. Rep. 275, 13 L. R. A. (N. S.) 490); 8 C. J. 183, 186; 3 R. C. L. 874, 881. See the extensive notes in 5 B. R. C. 702 and in 13 L. R. A. (N. S.) 490. The adjudications, with rare if any exceptions, hold not only that a *bona fide* holder may write his own name in the blank as payee, or he may, if he chooses, insert the name of his transferee. The courts have too with but few, if any, exceptions ruled that where the first holder of a note, containing a blank for the name of a payee and payable to order, indorses the note and then transfers it, the transferee can complete the instrument by writing the name of the first holder in the blank as payee: *First Nat. Bank v. Johnston*, 97 Ala. 655, 665 (11 South. 690); *Elliott v. Chestnut & Townsend*, 30 Md. 562; *Aiken v. Cathcart*, 3 Rich. L. (S. C.) 133 (45 Am. Dec. 764); *Fretwell v. Carter*, 78 S. C. 531, 535, (59 S. E. 639).

6. If whatever rights Grace Simpson may have against Mrs. M. Josephson were wholly to be determined and governed by the rules of the law-merchant then under the rule which prevailed in this jurisdiction Grace Simpson could not have sued the maker of the note unless the blank in the instrument were filled with her name or that of some other person as payee, for the reason that she could not have sued and recovered upon an incomplete instrument: *Thompson v. Rathbun*, 18 Or. 202 (22 Pac. 837); *Seay v. Bank of Tennessee*, 3 Sneed (Tenn.), 558 (67 Am. Dec. 579); *First Nat. Bank v. Johnston*, 97 Ala. 656, 664 (11 South. 620). In brief, under the rules of the law-merchant Grace Simpson could, in the absence of knowledge of special instructions given by Mrs. M. Josephson, have filled the blank by writing in her own name as payee, or

in case she transferred the instrument to another person, she could have inserted the name of that transferee as payee; if the bank had indorsed the note and then delivered it to Grace Simpson, she could have inserted the name of the bank as payee; and to enable a recovery on the note by the holder against the maker it was essential that some person be named as payee for the reason that the instrument is incomplete unless some person is named as payee, and the words "or order" appear in the paper. These rules of the law-merchant, while not controlling, are at least helpful when construing the negotiable instruments law.

Section 5847, L. O. L., which corresponds with Section 14 of the uniform negotiable instruments law, reads thus:

"Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein, and a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time; but if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

7. This section of the negotiable instruments law has in the main reaffirmed the rules of the law-merchant: *State v. Mitton*, 37 Mont. 366 (96 Pac. 926, 127 Am. St. Rep. 732); *Diamond Distilleries Co. v. Gott*,

137 Ky. 585 (126 S. W. 131, 31 L. R. A. (N. S.) 643); *Linthicum v. Bagby*, 131 Md. 644 (102 Atl. 997). In some particulars, however, Section 5847, L. O. L., changes some of the rules of the law-merchant. It must be remembered that we are not now dealing with a case where the maker of a note intrusts the instrument to his agent with directions on certain conditions to fill a blank by writing in the name of a designated person as payee, but contrary to instructions the agent fills the blank by writing in the name of some person other than the one designated by the maker and then for value delivers the paper to such other person. In some jurisdictions such a payee has been held under the provisions of the negotiable instruments law to be a holder in due course while in others a contrary conclusion has been reached: *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350 (112 N. W. 807, 124 Am. St. Rep. 275, 13 L. R. A. (N. S.) 490); *St. Charles Sav. Bank v. Edwards*, 243 Mo. 553 (147 S. W. 978); *Bowles Co. v. Clark*, 59 Wash. 336 (109 Pac. 812, 31 L. R. A. (N. S.) 613); *Ex parte Goldberg*, 191 Ala. 356 (67 South. 839, L. R. A. 1915F, 1157); *Liberty Trust Co. v. Tilton*, 217 Mass. 462 (105 N. E. 605, L. R. A. 1915B, 144); *Brown v. Rowan*, 91 Misc. Rep. 220 (154 N. Y. Supp. 1098). See, also, *Herdman v. Wheeler*, 1 K. B. 361; *Lloyd's Bank v. Cooke*, 1 K. B. 794 (8 Ann. Cas. 182); *Smith v. Prosser*, 2 K. B. 735; and note in 5 B. R. C. 702. See 8 C. J. 469. Nothing said in the opinion rendered in *Bank of Gresham v. Walch*, 76 Or. 272 (147 Pac. 634), should be construed to mean that this court is committed to the doctrine that under the negotiable instruments law the payee is never a holder in due course. In that case, as in all other cases, the opinion of the court must be read in the light of the facts discussed by the court. In *Bank of Gresham v. Walch*

the defense against the note was based upon representations made by the agents of the bank and the decision was controlled by those representations; and hence the opinion and all the language found in it must be read in the light of the fact that the agents of the bank made certain representations which constituted the very foundation of the defense made by the defendant there.

8, 9. It will be noticed that the person upon whom authority is conferred, by Section 5847, L. O. L., to complete the instrument is not referred to as the "holder" but as the one "in possession." And while it is not necessary to determine whether a mere agent to whom the maker has intrusted a note for delivery to some designated person is a person "in possession" within the meaning of Section 5847, L. O. L., which authorizes "the person in possession" to complete an instrument by filling up a blank, nevertheless all will no doubt admit that Grace Simpson is a "person in possession" within the meaning of the statute. It will also be noticed that the "person in possession" is only given *prima facie* authority to fill a blank and that the person filling the blank must do so "strictly in accordance with the authority given" before he can enforce the instrument against any person becoming a party to it prior to its completion. When the note of Mrs. M. Josephson came to Grace Simpson it contained a blank for the name of the payee, and hence she, as the "person in possession," possessed *prima facie* authority to fill the blank by writing in her own name or that of her transferee. But according to the allegation in the complaint the maker of the note "intended and authority was given therefor to insert the name of the defendant," and therefore, since the authority to fill the note was not set at large by the maker so that the name

of any holder could be inserted, but was limited so that only the name of the bank could be written in the blank, it follows that Grace Simpson was bound to insert the name of the bank as the payee in the note. A precedent squarely in point as to this phase of the discussion is furnished by *Tower v. Stanley*, 220 Mass. 429 (107 N. E. 1010). See, also, *National Investment & Security Co. v. Corey*, 222 Mass. 453 (111 N. E. 357); *Hartington Nat. Bank v. Breslin*, 88 Neb. 47 (128 N. W. 659, Ann. Cas. 1912B, 1008, 31 L. R. A. (N. S.) 130); *Johnston v. Hoover*, 139 Iowa, 143 (117 N. W. 277); *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350 (112 N. W. 807, 124 Am. St. Rep. 275, 13 L. R. A. (N. S.) 490); *Exchange Bank v. Robinson*, 185 Mo. App. 582 (172 S. W. 628); *Equitable Trust Co. v. Lyons*, 72 Misc. Rep. 49 (129 N. Y. Supp. 79); 3 R. C. L. 875; Brannan's Neg. Inst. Law, 19. In other words, Grace Simpson came into possession of an incomplete note payable to "order" and one which she could not enforce against the maker unless it were first made complete by inserting the name of a payee and one which she as the "person in possession" could not make complete unless she inserted the name of the bank as payee "strictly in accordance" with the authority given by the maker; and, we may add, that we infer from the pleading that it was the intention not only of the maker but also of the bank that the name of the bank should be written in as payee. Thus far we have only considered the rights assertable by Grace Simpson against the maker of the note; and now it becomes necessary to inquire whether she can enforce any contract arising out of the note against the bank if it is deemed an indorser.

10. The plaintiff contends that she is entitled first to the indorsement of the bank on the note and then to a

judgment against the defendant for the balance due on the instrument. If the plaintiff is entitled to compel the defendant to indorse the note she can do so only by a suit in equity: *Fultz v. Walters*, 2 Mont. 165; 1 Daniel on Neg. Inst. (6 ed.), 744; Brannan's Neg. Inst. Law, 259.

11. In this jurisdiction the distinction between suits in equity and actions at law is preserved. The proceeding brought by the plaintiff is an action at law and not a suit in equity; and, since the court cannot compel an indorsement of the note in an action at law, but can do so only in a suit in equity, it necessarily follows that, since the amended complaint is in its present condition insufficient as a complaint in equity, the trial court correctly sustained the demurrer to the complaint even though it be assumed that the plaintiff is entitled in a proper proceeding to compel the bank to indorse the note. But it is said in Section 390, L. O. L., as amended by Chapter 95, Laws 1917, that—

“No cause shall be dismissed for having been brought on the wrong side of the court. The plaintiff shall have a right to amend his pleading to obviate any objection on that account.”

12. It is possible that the plaintiff can so amend her complaint as to entitle her to the indorsement of the bank and to a judgment against it as an indorser, and hence the cause will be remanded with permission granted to the plaintiff to amend her complaint within the authority of Chapter 95, Laws 1917: *Farmers' Loan & Trust Co. v. Brown*, 182 Iowa, 1044 (165 N. W. 70); *Brown v. Wilson*, 45 S. C. 519 (23 S. E. 630, 55 Am. St. Rep. 779, 780).

The plaintiff relies upon Section 5882, L. O. L., which corresponds with Section 49 of the uniform negotiable instruments law, is substantially like Sec-

tion 31 (4) of the English Bills of Exchange Act, 1882. and reads as follows:

“Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.”

13. It must be remembered that at the time when the bank transferred the note to Grace Simpson the instrument did not contain the name of a payee, although the note was payable to “order” and contained a space which was plainly intended as the place for the insertion of the name of some payee. If, when the note was transferred by delivery to the plaintiff, the name of the bank appeared in the note as payee, then by force of the express terms of the statute the plaintiff would be entitled to the indorsement of the bank: *Lawless v. State*, 114 Wis. 189, 192 (89 N. W. 891); and so, too, in the absence of a statute she could compel the bank to indorse the note: *Unterkarnscheidt v. Missouri State L. Ins. Co.*, 160 Iowa, 223 (138 N. W. 459, 45 L. R. A. (N. S.) 743); *Swenson v. Stoltz*, 36 Wash. 318 (78 Pac. 999, 2 Ann. Cas. 504); *Schoepfer v. Tommack*, 97 Ill. App. 562, 567; *Walters v. Neary*, 21 T. L. R. 146. It is true that many of the precedents and writers upon the subject do no more than to define the right of a transferee to the indorsement of the transferrer where the transferrer expressly agreed to indorse an instrument payable to his order but because of inadvertence, mistake or fraud failed to do so, and yet it is doubtful whether any of those precedents or writers can be regarded as authority for saying that the transferee

would not be entitled to the indorsement unless the transferrer expressly agreed to indorse: 1 Daniel on Neg. Inst. (6 ed.), 857; Byles on Bills (7 ed.), 157; 1 Parsons on Notes & Bills, 273; *Hughes v. Nelson*, 29 N. J. Eq. 547; Story on Promissory Notes, § 120; 1 Story's Eq. Jur. (13 ed.), § 99b; *Southard v. Porter*, 43 N. H. 380; *Brown v. Wilson*, 45 S. C. 519 (23 S. E. 630, 55 Am. St. Rep. 779). If the right to an indorsement must be predicated upon an agreement, it is more logical and certainly more consistent with the character, qualities and purposes of the paper dealt with to deduce from the character, qualities and purposes of such paper the conclusion that the agreement for the indorsement may, under the rules of the law-merchant, be implied; and that, therefore, if at the time of the transfer the parties are silent upon the subject of indorsement, then the law implies an agreement by the transferrer to indorse a negotiable instrument when it is made payable to his order: *Schoepfer v. Tommack*, 97 Ill. App. 562, 566; *Wade v. Guppinger*, 60 Ind. 376, 378; *Walters v. Neary*, 21 T. L. R. 146; *Hood v. Stewart*, 17. Session Cases (4th Series), 749, 761. In *Watkins v. Maule*, 2 Jac. & W. 237, 243, an oft-cited precedent, it was said:

“When a note is handed over for valuable consideration, the indorsement is mere form; the transfer for consideration is the substance; it creates an equitable right, and entitles the party to call for the form. The other is bound to do that formal act, in order to substantiate the right of the party to whom he has transferred it.”

14. In *Ex parte Greening*, 13 Ves. Jr. 206, the court said that the transfer creates an equitable right and entitles the holder to call for the form “which it would be fraudulent to withhold.” In some precedents the

central thought seems to be that the transferee is entitled to the indorsement of the transferrer so that the former may be vested with the legal title and thus be enabled to sue in his own name, while in others some emphasis is placed upon the idea that the transferee is entitled to have the negotiable character of the paper preserved. In case of an express agreement for an indorsement the transferee was of course entitled to compel the transferrer to perform his agreement: *Hughes v. Nelson*, 29 N. J. Eq. 547; *Southard v. Porter*, 43 N. H. 380. We are not called upon to determine the true reasons which underlie the rule which under the law-merchant gave to the transferee of paper payable to order the right to the indorsement of the transferrer. Common-law precedents and discussions by text-writers of the rules of the law-merchant are valuable, however, in ascertaining the meaning of the statute.

At common law the mere delivery of an indorsed instrument payable to the order of the transferrer only passed an equitable title with the result that, to enforce payment by the maker, the transferee was obliged to cause an action to be prosecuted in the name of the transferrer. A transfer without indorsement destroyed the negotiability of the paper and the transferee held it subject to whatever equities were available to the payer against the transferrer. With the adoption of the Codes, however, it was quite generally held that the transferee could sue in his own name, for the reason that he was the real party in interest notwithstanding the fact that the title transferred was equitable and subject to the defenses which the payer might have made prior to notice of the transfer: *Moore v. Miller*, 6 Or. 254 (25 Am. Rep. 518); *First Nat. Bank v. McCullough*, 50 Or. 508, 514 (93 Pac. 366,

17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758); *McFeron v. Doyens*, 59 Or. 366, 369 (116 Pac. 1063); *Baker v. Moran*, 67 Or. 386, 394 (136 Pac. 30); *First Nat. Bank v. Moore*, 137 Fed. 505 (70 C. C. A. 89); *Cornish v. Wolverton et al.*, 32 Mont. 456 (81 Pac. 4, 108 Am. St. Rep. 598); *Meuer v. Phoenix Nat. Bank*, 94 App. Div. 331 (88 N. Y. Supp. 83); *Jenkins v. Wilkinson*, 113 N. C. 532 (18 S. E. 696); *Pavey v. Stauffer*, 45 La. Ann. 253 (12 South. 512, 19 L. R. A. 716, 721); *Haskell v. Mitchell*, 53 Me. 468 (89 Am. Dec. 711); 8 C. J. 385.

15. The statute, Section 5882, L. O. L., declares in express terms that the transfer "vests in the transferee such title as the transferrer had therein," and hence by force of the statute itself the transferee is vested, not only with the equitable but also with the legal title, although the transferee cannot until indorsement be treated as a holder in due course: *Goodsel v. McElroy Bros. Co.*, 86 Conn. 402 (85 Atl. 509); Brannan on Neg. Inst. Law, 50; *Cantrell v. Davidson*, 180 Mo. App. 410 (168 S. W. 271); *Carter v. Butler*, 264 Mo. 306, 324 (174 S. W. 399, Ann. Cas. 1917A, 483); *Keel v. Construction Co.*, 143 N. C. 429, 434 (55 S. E. 826); *Manufacturers' Commercial Co. v. Blitz*, 131 App. Div. 17 (115 N. Y. Supp. 402); *Mayers v. McRimmon*, 140 N. C. 640 (53 S. E. 447, 111 Am. St. Rep. 879); *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349 (23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765).

Inasmuch as the statute in express terms vests the transferee with the legal title and then declares that, in addition to acquiring all the title of the transferrer, the transferee acquires "the right to have the indorsement of the transferrer," it necessarily follows that this additional right is granted for the purpose of accomplishing some result besides the mere transfer of

the title; and since the only other reasonably assignable purposes relate to the negotiability of the paper and to the rights arising out of the contract of indorsement, it follows as another necessary conclusion that at least one of the purposes of the statute in granting the right to the indorsement was to preserve the negotiability of the paper. All will probably concede that one of the purposes was to preserve negotiability; but there may be room for debate as to whether the transferee can call for an unqualified indorsement and thus secure the most complete rights which an indorsement can create. The next inquiry brings us to a discussion of the kind of indorsement which the transferee can call upon the transferrer to make.

The statute, Section 5866, names five species of indorsement; special, blank, restrictive, qualified and conditional. For convenience, indorsements may be referred to as qualified or unqualified, and we shall confine the discussion to a consideration of whether the transferee is entitled to an unqualified indorsement or whether he must be satisfied with a qualified indorsement. The essential difference between a qualified and unqualified indorsement is found in the extent of the liability imposed by the contract created by the indorsement: Sections 5898 and 5899, L. O. L. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument, although Section 5871, L. O. L., declares that "such an indorsement does not impair the negotiable character of the instrument." If the purpose of the statute is merely to prevent the paper from permanently losing its negotiability, then that purpose is fully accomplished by a qualified indorsement. But it must be remembered that the statute does not specify the kind of indorsement. It must also be remembered that an unqualified indorse-

ment is in a certain sense unlimited while a qualified indorsement is limited. Again, it must be remembered that an unqualified indorsement is the one most used in the commercial world and the one which is generally expected by the transferee unless the parties have agreed to the contrary. At least two and possibly more writers have referred to *Seeley v. Reed* (C. C.), 28 Fed. 164, as authority for saying that a contract for the transfer of a note only carried with it the right to a qualified indorsement; but that case must be read in the light of the nature of the contract made between the parties, the relation which Reed sustained to the corporation, and the reason for making the notes of the corporation "payable to his own order"; and when the opinion is so read it cannot be treated as a precedent for holding that the transfer of an unindorsed note payable to order carried with it only the right to a qualified indorsement. In *Wade v. Guppinger et al.*, 60 Ind. 376, it was held that where one person agrees to transfer a note to another, the law implies that the transfer is to be made by indorsement, unless a different agreement is made by the parties, and that in the absence of an agreement to the contrary the transferee is entitled to a "simple indorsement"; and it was therefore decided that the party claiming that the transfer was to be by "indorsement without recourse or otherwise than by simple indorsement, has on him the burthen of so proving." We think that the doctrine approved in *Wade v. Guppinger* is consistent with legal principles and entirely in harmony with the use made of negotiable instruments in the commercial world.

If an unqualified indorsement may be considered as containing within it the whole sum of the rights capable of being given by the contract which results

from an indorsement, then a qualified indorsement must be deemed to confer only a portion of those rights. One embraces the whole sum; the other represents only a part of that sum. The statute gives the right to an indorsement without saying whether it shall be the whole sum or only a part; and therefore, as in the case of a contract, when the statute gives the right to an indorsement without naming the species, the law will imply an agreement for the whole sum rather than for only a part of the rights capable of being conferred by an indorsement, and this implication will prevail unless the party claiming to the contrary submits sufficient evidence to sustain his claim: *Wade v. Guppinger et al.*, 60 Ind. 376. Apparently assuming that Section 49 of the negotiable instruments law relentlessly commands an unqualified indorsement regardless of an agreement for a lesser indorsement, one critic of the negotiable instruments law has suggested the propriety of amending Section 49 so as to provide for a qualified indorsement. Another writer answers the criticism and urges that—

“It certainly does not follow that Section 49 requires an unqualified indorsement in every case, * * Section 49 does not specify any one kind of indorsement. In every case the transferee must go into a court of equity to compel an indorsement. Obviously he will be given the kind of an indorsement to which he is entitled. If the parties agreed that the transferrer was not to assume personal liability, an indorsement ‘without recourse’ gives the transferee all that he is entitled to by common sense, by equity or by Section 49”: Brannan’s Neg. Inst. Law, 170, 259. See, also, 14 Harvard Law Review, 241; 41 American Law Register (N. S.), 437, 499, 561.

16. We think, therefore, that Section 5882, L. O. L., gives to the transferee the right to an unqualified in-

dorsement unless the parties agreed that the indorsement should be qualified.

17, 18. According to the amended complaint, the maker of the note authorized the bank to fill the blank and the inference is that both the maker and the bank intended that the blank should be so filled with the name of the bank, for the pleading declares that "it was intended * * to insert the name of the defendant." The note should have been filled pursuant to the authority so given and in accordance with the intention so entertained. When the bank delivered the note to the plaintiff it knew that she could not compel the maker to pay the note unless the name of the bank appeared as payee in the note; and, hence, in these circumstances, equity will hold that to be done which ought to be done and direct the note to be completed in conformity with the intention of the original parties: *Farmers' Loan & Trust Co. v. Brown*, 182 Iowa, 1044 (165 N. W. 70); *Hughes v. Nelson*, 29 N. J. Eq. 547, 550. Treating the note as one made payable to the order of the bank and treating the note as having been in that condition at the time of the transfer, the plaintiff would then by force of Section 5882, L. O. L., be entitled to the indorsement of the bank, and, moreover, she would be entitled to an unqualified indorsement unless there was an agreement to the contrary. We, of course, must not be understood to hold that the facts are as set forth in the amended complaint. We simply assumed, as we must, without deciding, that the facts are as related in the only pleading before us and our discussion has been based upon a mere assumption as to the facts.

The ruling of the trial court sustaining the demurrer was correct and it is affirmed; but the cause is remanded for the purpose of affording the plaintiff an

opportunity to amend her complaint, if she so desires, and thus enter a court of equity.

MODIFIED AND REMANDED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued June 24, reversed and remanded September 23, rehearing denied November 25, 1919.

ANDERSON v. COLUMBIA CONTRACT CO.*

(184 Pac. 240; 185 Pac. 231.)

Fish—Whether Destruction of Fish-traps by Tugboat was Negligence for Jury.

1. In an action by the owner of a fish-trap against the owner of a barge for damages resulting to the trap, the questions whether or not the defendant negligently failed to maintain sufficient lights, to keep a lookout, or to see and avoid the trap, or operated the flotilla at a dangerous speed, or negligently failed to stop the tugboat and her tow and avoid the fish-trap, were properly for the jury.

Navigable Waters—Columbia River is a Navigable Stream.

2. The Columbia River is a navigable stream, and as such is a common highway "and forever free," and the right of navigation therein is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union.

Fish—Paramountcy of Right of Navigation Does not Extinguish Common Right of Fishery.

3. The paramountcy of the right of navigation does not extinguish the common right of fishery, although the former does, whenever there is a necessary conflict, limit the latter and compel it to yield, so far as the right of fishery interferes with the fair, useful, and legitimate exercise of navigation rights, but the navigator must use ordinary care and due regard to property rights of fishermen.

[As to the right to fish in navigable waters, see note in 21 **Ann. Cas. 777.**]

*Authorities discussing the question of right to construct fish-traps in front of riparian property are collated in a note in **L. R. A. 1918A, 1076.**
REPORTER.

Navigable Waters—Unauthorized Obstruction to Navigation Does not Permit Its Negligent Destruction.

4. The public is entitled to navigate upon any part of the navigable waters of a stream without unlawful obstructions, and an obstruction erected under grant of authority beyond the limits of the orders of authorization is unlawful, and a nuisance only to the extent the authority was exceeded, and that it is wholly or partly unauthorized does not necessarily give a navigator authority to destroy it negligently.

Trial—Instruction Omitting Reference to Negligence Cured by Subsequent Instruction.

5. In an action for destruction of a fish-trap by a tug, an instruction as to defendant's negligence that "it is charged" "that the boat was being operated outside of and beyond the channel or course in which vessel should be operated," while insufficient, when standing alone, for omission to allege "negligently operated," the error was cured by another instruction covering negligent operation.

Fish—Whether Destruction of Fish-trap by Tugboat was by Negligent Navigation Question for Jury.

6. In an action for the negligent destruction of a fish-trap by a tugboat, an instruction that it was the "duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated" held erroneous, since it was not negligence *per se* to operate the boat outside of the usual course followed by vessels; the matter being a question of fact for the jury.

Fish—Evidence Sufficient to Show Authorized Construction of Fish-trap.

7. Where plaintiff, in an action for damages for injuries resulting from his fish-trap being struck by defendant's tugboat, was authorized by both the State of Washington and the United States to erect and maintain the trap, evidence held to show that a part, if not all, of the portion of the trap injured or destroyed was erected in accordance with such permits and was a legal obstruction.

Courts—Action for Destruction of Fish-trap Maintainable in State Other Than Where Located.

8. Where no part of a fish-trap was driven into the earth, except piling, all of which was driven by the owner with the intention of removing at the end of the season, the trap was "personal property," and an action against the owners of a tugboat for its destruction was transitory, and could be maintained in a state other than where the trap was located.

Damages—Evidence of Daily Catch Admissible in Action for Destruction of Fish-trap.

9. In an action against the owner of a tugboat for destruction of plaintiff's fish-trap, although such trap may not have "rental value," in the usual sense of the term, yet it has a usable value, which plaintiff would be entitled to recover, and evidence as to the amount of the fish catch just prior to injury or destruction and just

after repair, together with evidence of the catch of other near-by traps between such times, was competent evidence, not for the purpose of measuring the compensation, but for estimating the usable or rental value.

PETITION FOR REHEARING.

Trial—Instruction—Cure of Error by Other Instruction.

10. A party cannot claim that an erroneous instruction was not prejudicial because another instruction correctly stated the law, where the erroneous instruction stood out as boldly and prominently as the proper instruction.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

The Columbia Contract Company, an Oregon corporation having its principal office in Portland, appealed from a judgment for \$1,050 which Peter Anderson obtained against it, for damages done to his fish-trap by the company's towboat and barges. Anderson owned a pound net fish-trap on the Washington side of the Columbia River. The waters of the river are affected by the ebb and flow of the ocean tides at the place where the trap is located. The fish-trap was constructed by driving piling into the bed of the river and attaching web or nets to the piling in the manner described in *Monroe v. Withycombe*, 84 Or. 328, 331 (165 Pac. 227). The extreme width of the heart of the Anderson trap was approximately 50 feet; the lead was about 350 feet long with the piling in it set from 8 to 10 feet apart; and hence the trap was about 400 feet over all.

About 300 feet above the Anderson trap and on the Washington shore of the river was a light and back farther "up in the woods" was a second light. These two lights are known in the record as the range lights. On the Oregon side of the river and above the Anderson trap is a place called Bugby Hole where another light is kept; and between Bugby Hole and the Ander-

son trap is a bar in the river, called Puget Bar. Upon leaving Bugby Hole, masters of vessels navigate Puget Bar by getting in line with the two range lights and steer on that course until the bar is crossed.

Along the entire length of the Anderson trap the water is about 17 feet in depth except at the "inner end" where it is "about 8 or 10 feet." About 1,800 feet above the Anderson trap on the Washington side of the river is another trap known as the Brandt trap. There is no obstruction between these two traps. Referring to the towboat and barges operated by the defendant, one witness stated that there "was water enough" between the two traps "so that you could go pretty close by the shore."

We cannot speak any more definitely of the width of the river at the place where the Anderson trap is located than to say that it is between 2,000 feet and one mile. Puget Bar ends at a point above the Anderson trap. According to the testimony of one witness for the plaintiff "after you get across the bar, and down the river, the whole river is deep and you can go anywhere." Another witness for Anderson stated that "it is deep water clear across" opposite the Anderson trap. J. O. Church, who was employed by the defendant as master of the towboat "Samson" and was thoroughly familiar with the presence and location of the Anderson trap, explained that if it be assumed that the river is 2,000 feet wide at the Anderson trap "you will probably have 500 feet there" beyond the outside end of the trap to "navigate in." The plaintiff contended that there "is three or four thousand feet of channel there—deep water across the channel."

The witnesses differed in their opinions as to how far vessels usually ran outside the Anderson trap when

passing up or down the river. The estimates given by the witnesses for the plaintiff range from 800 to 1,000 feet. Captain Church, a witness for the defendant testified: "I should judge the steamships ran in within 250 feet." J. E. Copeland, a master of steamboats with many years of experience, stated that the course usually followed by him before the trap was put in ran about 20 feet from it; but after the trap was installed he made a change in his course by changing one eighth of a point in the distance from Puget Bar to the range light and this changed course passed the end of the trap at a distance of about 200 feet.

The Columbia Contract Company was engaged in transporting rock down the river to the jetty at the mouth of the river and for that purpose the company used three barges and a towboat called the "Samson." Each barge when loaded carried about 800 tons of rock and drew about 10 feet of water. The "Samson" drew between 14 and 14½ feet of water. Each of the barges was about 140 feet long and approximately 40 feet wide. The "Samson" was about 125 feet long with a 25 foot beam. At some time in 1911, probably September 28th, the defendant was taking the "Samson" and three barges loaded with rock down the river. One barge was lashed to the bow of the "Samson" while a second barge was lashed on one side and the third barge was lashed on the other side of the first barge and towboat, making of the towboat and barges, what counsel have termed in their briefs, a "spike formation." The flotilla was approximately 120 feet wide. The "Samson" with its barges passed Bugby Hole about 3 A. M. and at that time it was so foggy that the range lights above the Anderson trap could not be seen. The fog made its appearance on the river about midnight and in a short time became so thick

that the range lights were completely obscured from view and could not be seen by fishermen on the river. One fisherman, Christian Tholo, was operating a gill-net in the channel of the river a short distance above the Anderson trap and upon hearing the fog signal of the "Samson" he took in his net. He could not see the range lights; nor could he see either the Oregon or Washington shore and after changing the course of his gasoline boat several times he finally found himself at the end of the Brandt trap, where he tied his boat. Another fisherman, Olaf Vog, was likewise operating a gill-net in the channel of the river near to and a short distance above the Anderson trap. When he reached what he supposed was the end of his drift, or the place where he "should start to pick up" he took up his gill-net and although he "wanted to get over to the Oregon shore" he found himself on the Washington side at the Anderson trap, where he tied up "and laid down in the boat."

Not being able to see the range lights, upon leaving Bugby Hole the master of the "Samson" navigated his vessel by clock and compass by noting the time shown by the clock and by observing the course recorded in his course-book. He explained that 14 minutes of running would have brought the flotilla to the Anderson trap; that at the end of 11 minutes he slowed down and at the end of 12 or 13 minutes he stopped the engines and drifted. After Puget Bar is crossed and while passing the Brandt and Anderson traps, vessels, when following the usual course, are not navigated on a tangent but are steered along the line of a slight curve. The two traps are on the outer side of this curve. The usual course taken by vessels is farther out from the Brandt trap than from the Anderson trap and yet Tholo, the fisherman who had tied up his boat

at the Brandt trap, says that the "Samson" and the barges passed within 20 feet of the Brandt trap. According to this witness the "Samson" with its barges proceeded down the river through the waters between the Brandt and Anderson traps and then ran on through the latter trap. The flotilla ran through the lead of the Anderson trap at a point between the heart and inner end of the lead, taking out 24 piling and ran so close to the heart of the trap that only one or two piling next to the heart and in the lead remained standing.

Anderson repaired the trap and at the end of two weeks from the date of the accident was able again to operate it. He sued the Columbia Contract Company for the total sum of \$1,618.60. This total sum embraced two items; one for \$818.60, the cost of repairing the trap, and the other \$800, the amount of the "money and profits" which Anderson alleges he could and would have earned if the trap had not been injured.

The complaint contains six specifications of negligence. The plaintiff alleges: (1) That although there was a fixed channel and course in which vessels navigating the river should be operated, the defendant negligently failed to keep the tugboat within the limits of "said channel and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel and into and against said fish-trap;" (2) that the defendant negligently failed to maintain sufficient lights upon the vessel so that objects lying in the stream could be seen and avoided; (3) that the defendant negligently failed to maintain a lookout and neglected to keep a sufficient watch ahead; (4) that the defendant negligently failed to see and avoid striking the trap; (5) that the defendant negligently operated

the vessel at a dangerous and unsafe rate of speed; and (6) that the defendant negligently failed to stop the vessel and to run aside so as to avoid the fish-trap after the trap was or should have been seen by the defendant.

In its answer the defendant denies that it was guilty of negligence in any particular. As a further answer to the complaint the defendant avers that the fish-trap was unlawfully built and maintained and in such a manner that it obstructed the navigable channel of the river and was a menace to navigation; that the trap was unlawfully maintained in two particulars: (1) that it extended from the shore to a point in the navigable channel in the river; and (2) "that the signals and lights were not maintained thereon as required by law." The defendant alleges that at a time when it was lawfully navigating the river on a dark and foggy night and while moving slowly down the stream "in the channel thereof," and "solely because the said fish-trap was so located that it obstructed the navigable channel of the said river, the said steamboat with its tow ran into said fish-trap."

The plaintiff replied by traversing the affirmative allegations of the answer.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Teal, Minor & Winfree*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble*, with an oral argument by *Mr. A. M. Dibble*.

HARRIS, J.—The foregoing statement may be summarized by saying that the defendant attempted to navi-

gate the river at a time when it was so foggy that one could not see ahead and the range lights ceased to be an aid to navigation; that the defendant left Bugby Hole with the intention of following the usual course taken by vessels across Puget Bar and past the Anderson trap; that the towboat and barges were successfully navigated across Puget Bar; that the river is between 2,000 feet and a mile wide, at the point where the Anderson trap is located; that between 500 and 4,000 feet of that width opposite the Anderson trap is sufficiently deep for the navigation of vessels; that the usual course followed by vessels is between 200 and 1,000 feet from the outer end of the Anderson trap; that instead of following the usual course, as the master of the "Samson" says he intended, the flotilla, because of some controverted reason, got out of the usual course of vessels at a point at least 1,800 feet, and probably more, above the Anderson trap and proceeded on down the river outside of the usual course, but in waters deep enough for the navigation of the towboat and barges to and through the Anderson trap.

1. It is appropriate here to add to what already has been said that the master of the "Samson" testified that he did not see the Brandt trap at all and that it was so foggy that he did not see the Anderson trap until he was about 100 feet from it. On the other hand, Christian Tholo testified that the fog lifted before the "Samson" reached the Anderson trap and that when the boat was "in front of the lower range light" (300 feet above the Anderson trap) it was "swinging" and that at that time he saw the light on the end of the Anderson trap. The witness Vog corroborated the testimony of Tholo by saying that after the flotilla went through the trap "I was looking around and I could see the shore, the house ashore and

the woods back of the house." Anderson explained that his house was 600 feet below the front range light; and hence if his testimony is taken as true the trap, which was 300 feet below the range light, was 300 feet above the house. The "Samson" was displaying a red light on the port side and a green light on the starboard side as well as two white lights on the mast-head as required by the regulations. There was a white light on the outside of each barge. These lights, however, served to enable others to see the "Samson" rather than to enable the "Samson" to see other objects. In addition to the lights already mentioned the "Samson" was equipped with both an arc and a search light. The master of the vessel stated that the searchlight is not used in foggy weather, for the reason that such a light hinders rather than aids navigation. Besides the master who was at the time of the accident at the "Samson's" wheel there was a sailor on duty on the "Samson" as a lookout. There was a man on each barge but each of these three men was asleep.

As already stated, Captain Church testified that at the end of 11 minutes he slowed down and at the end of 12 or 13 minutes after leaving Bugby Hole he stopped the engines and drifted; but opposed to this evidence there was the testimony of Christian Tholo who told the jury that "when she passed me she had the speed that she usually had" and that after he saw the "Samson" she was going, so far as he could observe, "as she usually goes when it is clear." There was testimony for the plaintiff to the effect that vessels either anchored or tied up in heavy fogs; but there was also evidence for the defendant to the effect that only loaded ocean-going vessels, whether with or without a tug, anchored and that towboats with barges never anchored or tied up on account of the fog. The

master of the "Samson" testified that if the towboat had been equipped with a stern-wheel he could have backed out after seeing the trap and thus avoided it, but since the boat was equipped with a propeller an attempt to back out at any time after he saw the Anderson trap would have resulted in the flotilla swinging around and striking the trap broadside and thus causing greater damage to the trap. He also stated that when he discovered his predicament he started the engines and went through the lead of the trap as straight as he could and by so doing did the least possible damage; and that if he had not done this the flotilla would have taken out the heart of the trap. It is apparent from this brief account of the evidence that the questions of whether or not the defendant negligently failed to maintain sufficient lights, or negligently failed to keep a lookout, or negligently failed to see and avoid the fish-trap, or negligently operated the flotilla at a dangerous rate of speed, or negligently failed to stop the "Samson" and her tow and avoid the fish-trap, were all properly submitted to the jury. There was evidence upon both sides of these controverted questions and it was therefore the province of the jury to determine the facts. The trial court did not commit error, as contended by the defendant, in asking the jury to decide whether the corporation was negligent in respect to any of those five specifications of negligence.

Much of the discussion in the briefs relates to the allegation that the defendant "negligently failed to keep and maintain said tugboat within the limits" of the fixed channel and course in which vessels were usually operated. The defendant has urged numerous objections to the instructions given by the court, contending that some of them were erroneous and that

several of them were inconsistent with each other. The position taken by the defendant is rested largely upon the application which it contends should be made of the rule which gives paramountcy to the right of navigation.

2, 3. The Columbia River is a navigable stream and as such is a common highway "and forever free." This right is a public one and it is not only given by the common law but is preserved by the statute admitting the State of Oregon into the Union: *Johnson v. Jeldness*, 85 Or. 657, 661 (167 Pac. 798, L. R. A. 1918A, 1074). The right of fishery is likewise a common right. The right of navigation is paramount, for the reason that it is of the most importance to the public weal: *Davis v. Jerkins*, 50 N. C. (5 Jones L.) 290, 293; *Post v. Munn*, 4 N. J. Law (7 Am. Dec. 570, 1 Southard's Rep. 61); *Flanagan v. City of Philadelphia*, 42 Pa. St. 219, 228. Stated in general terms the right of fishery must give way to the right of navigation. Expressed in more accurate language the paramountcy of the right of navigation does not extinguish the right of fishery although the former does, whenever there is a necessary conflict, limit the latter and compel it to yield so far as the right of fishery interferes with the fair, useful and legitimate exercise of the right of navigation. Speaking of the abstract right of the public it may be said as expressed in 1 Farnham on Waters, Section 27:

"The public is entitled to the free, uninterrupted, and unobstructed use of every part of the stream, from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats * * either up and down or across, or from the main stream on to any particular part in

question, or thence on to the body of the stream; and this whether such part has ever been so used, and whether there is any present or anticipated necessity for so using it."

Continuing to employ general terms when referring to the right of navigation, in the abstract, a boat has a right to "take her course" and to go when and where it is necessary to go and is not obliged to stop or go out of her way or wait upon the movements of those who are managing a fishing seine or net; and yet this right of navigation which entitles the public to the unobstructed use of every part of the stream which is capable of navigation by boats and authorizes a boat to "take her course" cannot be exercised without regard to the rights of others. The navigator of a public stream must manage his craft with ordinary care and with due regard to the rights, property and lives of others: 1 Farnham on Waters, §§ 27, 31 and 33; *Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320, 332 (43 N. W. 576). While a boat may "take her course" nevertheless a navigator cannot with impunity do unnecessary damage to a fisherman or his property; but upon the contrary the paramount right of navigation must be exercised fairly, and not arbitrarily, and with due regard to the subordinate right of fishery and a boat must be so navigated as not to do unnecessary damage: 1 Farnham on Waters, § 33a; Gould on Waters (2 ed.), § 87; *Porter v. Allen*, 8 Ind. 1 (65 Am. Dec. 750); *Lewis v. Keeling*, 46 N. C. (1 Jones L.) 299, 307 (62 Am. Dec. 168); *Post v. Munn*, 4 N. J. Law (7 Am. Dec. 570, 1 Southard's Rep. 61). For example, if nets are placed across the channel of a river so as to be a bar to navigation, a vessel may, if reasonably necessary to do so, run over the nets; but if a navigator is warned or ought to have

known of his approach toward the net of a fisherman, he is liable for damage resulting from his negligent failure to avoid doing damage if he can do so without prejudice to the reasonable prosecution of his voyage: *Horst v. Columbia Contract Co.*, 89 Or. 344, 350, 352 (174 Pac. 161); *Hopkins v. Norfolk & S. R. Co.*, 131 N. C. 463 (42 S. E. 902); *Cobb v. Bennett*, 75 Pa. St. 326, 329 (15 Am. Rep. 752); *Wright v. Mulvaney*, 78 Wis. 89 (46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807). The ruling in *Wright v. Mulvaney* is of peculiar interest, for the reason that there as here a pound net fish-trap was injured by a boat with a tow and some of the other material particulars were like the facts presented here. The court says:

“But it does not necessarily result from this (the paramount right of navigation) that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right.”

4. When it is said that the public is entitled to navigate upon any part of the navigable waters of a stream without obstruction it must always be understood that reference is made to unlawful and not lawful obstructions. An obstruction placed in a stream may be authorized by competent authority and consequently the right of navigation is limited by that kind of an obstruction: *Gould on Waters* (2 ed.), § 87; *Davis v. Jerkins*, 50 N. C. (5 Jones L.) 290, 293; *Flanagan v. City*

of *Philadelphia*, 42 Pa. St. 219, 232; *Lewis v. Keeling*, 46 N. C. (1 Jones L.) 299, 306 (62 Am. Dec. 168); *Pound v. Turck*, 95 U. S. 459 (24 L. Ed. 525, see, also, Rose's U. S. Notes). If authority is granted for the erection of an obstruction in a navigable stream and the obstruction is so placed as to be partly beyond the limits of the authorization, then in that event the obstruction is unlawful and a nuisance only to the extent that the authority has been exceeded: *Knox v. Chaloner*, 42 Me. 150, 156; *Renwick v. Morris*, 3 Hill (N. Y.), 621, affirmed in 7 Hill (N. Y.), 575. Even though an obstruction is wholly or partially unauthorized, nevertheless this lack of authority for the erection or maintenance of the obstruction does not necessarily operate as authority to a navigator negligently to destroy the obstruction: 1 Farnham on Waters, § 33; *Dimes v. Petley*, 15 Q. B. 276 (19 L. J. Q. B., N. S., 449, 14 Jur. 1132); *The Brinton*, 66 Fed. 71 (13 C. C. A. 331).

5, 6. We may now direct attention to some of the instructions which the court gave to the jury. After defining negligence and explaining that the plaintiff could recover if the defendant was and he himself was not guilty of negligence the court told the jury, in instruction No. 3, that "it is charged" in the complaint "that at said time the said boat was being operated outside of and beyond the channel or course in which such vessels should be operated"; and then follows an enumeration of the remaining five specifications of negligence. Having referred to the first specification of negligence in the language already quoted and having enumerated the other five specifications the court, in instruction No. 4, then said:

If you find the defendant was "guilty of any one or more of said charges, and if you so find that any one

or more of said charges which you may so find defendant guilty of constituted negligence or lack of due care" and that such acts caused the injury then "plaintiff is entitled to a verdict" unless his own negligence contributed to the injury.

The jury was properly told, in instruction No. 5:

"That in operating its said vessel the duty rests upon defendant to operate the same in a reasonably careful manner, so as to avoid colliding with or injuring structures along the shore."

The next instruction related to the right and duty of the defendant when navigating in the fog and the succeeding instruction referred to the duty of maintaining a lookout. The next instruction, No. 8, reads as follows:

"It was also the duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated."

In instruction No. 9, the jurors were told:

"If you find from a preponderance of the evidence, therefore, that defendant failed to perform any one or more of these duties, then defendant was negligent and not in the exercise of due care."

Instruction No. 26 is important because it was given at the request of the defendant. This instruction begins by saying that if the jury found that the plaintiff had obtained permits from the State of Washington and the United States and had erected and maintained the trap in the place and manner provided by such permits and if the jury further found—

"That the defendant was careless and negligent in piloting, operating and navigating its towboat 'Samson,' and in thereby causing the same to run into and against the said fish-trap of plaintiff, and that the fish-trap was thereby damaged and injured the plaintiff is

entitled in such case, and in such case only, to recover from the defendant the amount of his damages; provided that the negligence of the defendant which occasioned the injury consisted in the failure of the defendant to keep and maintain its towboat within the limits of the navigable channel of the Columbia River and outside and beyond the fixed course and navigable channel of said river; or that the defendant failed to keep and maintain adequate and sufficient lights upon its towboat so that objects lying in the Columbia River could be seen and avoided; or that the defendant failed to keep and maintain a lookout upon its towboat and failed to keep and maintain a sufficient watch ahead; or that the defendant through negligence in looking ahead failed to see the fish-trap; or that, having seen the fish-trap, the defendant failed to use such means as were available to avoid striking and injuring the same; or that the defendant operated and propelled its towboat at a dangerous rate of speed, or at an unsafe rate of speed with regard to the condition of the weather, the atmosphere and the circumstances and conditions surrounding the locality where the accident complained of is alleged to have occurred; or that the defendant, having means to stop its towboat or to turn aside and thus avoid the fish-trap after the same was seen, failed to employ said means efficiently or to take proper and timely steps to stop its towboat or to turn aside and thus avoid the said fish-trap."

Instruction No. 8 was clearly erroneous. Instruction No. 3, standing alone, is not strictly accurate for the reason that it states that the complaint charges that "the boat was being operated outside" instead of including the element of negligence and saying that the boat was being "negligently" operated outside of the channel. However, when this instruction is construed in connection with instruction No. 4, then the two when taken together harmonize with the complaint. The plaintiff does not rely in his complaint upon the bald fact that the defendant got outside of

the channel usually followed by vessels, but he relies upon the charge that the

“Defendant carelessly and negligently failed to keep and maintain said tugboat within the limits of said channel and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel.”

The position of the plaintiff with respect to instructions 3 and 4 is made plain by the following excerpt taken from his printed brief:

“By said instructions, III and IV, the Court charged the jury that it was alleged in the complaint that appellant carelessly and negligently operated its boat outside of and beyond the channel or course in which vessels should be operated and that if the jury found, not only that appellant did this, but that its action in so doing resulted from negligence or a lack of due care and they also found that such negligence caused the damages to the trap respondent was entitled to recover, unless he was, himself, guilty of contributory negligence.

“In other words, the court instructed the jury that before they could find against appellant for navigating outside the channel or usual course of vessels they must find that it did so unnecessarily and because of negligence and a want of due care. It was properly left to the jury to say from all the circumstances taking into consideration the location of the trap and the width of the channel, whether appellant’s action in going outside of the usual channel and course of vessels was the result of an unfair or negligent exercise of its right of navigation.”

Instruction No. 26 is entirely consistent with instructions 3 and 4 and is in harmony with the construction which the plaintiff places upon these two instructions. Instruction No. 8, however, told the jury that it was the duty of the defendant to navigate its vessel

in the channel and the usual course taken by boats. When this instruction is considered in the light of all the instructions which had been previously given and in connection with instruction No. 9, it was equivalent to charging the jury that if the defendant got outside of the channel or usual course taken by vessels, that fact alone and of itself convicted the defendant of negligence; for after saying in instruction No. 8 that it was the duty of the defendant to operate its boat in the usual course taken by other vessels, the court said in instruction No. 9 that if "defendant failed to perform any one or more of these duties" then the defendant was negligent. It was not negligence *per se* for the defendant to navigate the flotilla outside of and beyond the course usually followed by vessels. It was a question of fact for the jury to say whether the defendant failed to exercise ordinary care in the navigation of its flotilla. It may fairly be assumed that the defendant concedes that when its flotilla left Bugby Hole its captain intended to follow the usual course taken by vessels and did not intend to go between the Brandt and Anderson traps; the defendant does not contend that the business in which it was engaged required it to go outside of the usual course or to navigate the waters between the Brandt and Anderson traps; and consequently the ultimate question of fact is whether the defendant failed to use due care when transporting the rock down the river, and although a failure to keep within the usual course taken by vessels is not negligence as a matter of law, nevertheless as stated in *Porter v. Allen*, 8 Ind. 1, 4 (65 Am. Dec. 750), "though it was proper for the jury to consider the fact" that the boat was not in the usual and ordinary channel where boats are usually run "in connec-

tion with the other facts proved in the case, still it was alone insufficient to control the verdict."

The charge to the jury should, of course, in this as in all cases, be considered as a whole with the view of ascertaining if possible whether the rights of the appealing litigant were so prejudiced as to prevent a fair trial. Instruction No. 8 was not a mere parenthetical statement made during the course of the charge, but it stands out as prominently as any other single instruction appearing in the charge, and it contains plain language which the jury could not have misunderstood; and hence a reversal of the judgment becomes necessary.

7. The defendant insists that the Anderson trap was an unlawful obstruction. The plaintiff was authorized by both the State of Washington and the United States to erect and maintain the trap. All the evidence shows that the trap was neither above nor below the place indicated in the permits, although there is a controversy as to whether or not the trap extended farther out into the river than allowed by the permit given by the United States. The defendant argues that all that part of the trap which was taken out when the flotilla went through the lead was beyond the limits fixed by the permit. The evidence shows conclusively that the 24 piling taken out were either in whole or in part within the limits of the federal permit. The defendant argues that the trap exceeded the length allowed by the permit by 180 feet. Even though it be assumed that the trap was 180 feet too long, still it must be remembered that the heart was 50 feet wide, and if to this width is added the distance covered by the one or two piling left standing next to the heart, and also the distance covered by the 24 piling taken out, it will be seen that only a part of the obstruction

was unlawful in the sense that it exceeded the authority given to the plaintiff. If, on the other hand, the trap did not extend beyond the point allowed by the permit, then all of it was authorized and no part of it was an illegal obstruction. No part of the trap was within the usual course followed by vessels going up or down the river.

8. The defendant has urged with much vigor that this is a local action and therefore triable only in the State of Washington. The plaintiff first obtained a permit from the United States in 1901 and he operated under that permit until 1912 when he received a new permit. In each year of that period, except possibly four or five years when he did not put in the trap, the plaintiff drove the piling for his trap and completed its construction a short time before the fish began to run and then when the fishing season ended for that year he pulled out the piling and removed the trap. No part of the trap was driven into the earth except the piling; and all the piling were driven by the owner with the intention on his part of removing them at the end of the season; and hence the trap was only personal property: *Johnson v. Pacific Land Co.*, 84 Or. 356 (164 Pac. 564); *Roseburg National Bank v. Camp*, 89 Or. 67 (173 Pac. 313). The trap was only an appliance used by the plaintiff in the exercise of his right to fish. The action is not one for trespass upon real property; nor is it prosecuted on account of any assault upon the right of fishery. The trap was personal property and was used as an appliance by the plaintiff, a salmon fisherman; and when that appliance was damaged the result was not different in principle from the situation presented by some person negligently breaking an ordinary trout-rod which the owner was using for casting from the bank into a

stream and even though the trout fisherman owned the bank upon which he stood while casting. The injury complained of was damage to the trap and the action is transitory.

9. The next question relates to the measure of damages. The court said to the jury that if the plaintiff was entitled to recover at all he was entitled "to such damages as you may find from a preponderance of the evidence will fairly compensate him for the loss he has suffered"; and that—

"There are two elements of damage to be considered by you. First, you will consider and determine from the evidence the reasonable amount that it would be necessary to expend to repair plaintiff's trap and restore it to the same or as good condition as it was before the injury. Second, you will determine from the evidence the value of the use of plaintiff's trap during such time as it was necessarily delayed by the injury to it. The sum of these two elements so determined by you would be the amount plaintiff is entitled to, if entitled to any sum."

Besides evidence relating to the cost of repairing the trap there was testimony concerning the number of fish caught by the Anderson trap before the accident and also after the trap was repaired as well as testimony about the catch made by other traps in that locality and on the same side of the river. The Anderson trap had been in operation from September 10, 1911. There was evidence to the effect that the catch made by the Anderson trap averaged 1,500 or 1,600 pounds a day for a few days before the accident; that the fish "generally run steady on that place there, right along. When we have a run, we have one at about the same time as the other places." The plaintiff testified that the "run of Silver-side Salmon" continued during the period of two weeks while his trap

was out of repair "because the rest of the traps above me and below me had lots of fish at the time when she was broke off"; that during those two weeks the traps above and below his trap "were catching up to a couple of tons a day"; that after the trap was repaired the average catch was "about 1,600 or 1,700 pounds per day." Charles Brandt, who was an experienced trap fisherman and thoroughly familiar with the Anderson trap, testified that he knew the reasonable value of the use of the Anderson trap and that its value was "between \$50 and \$60 a day" during "the time she was broke down"; however, he also stated that he never knew of a trap having been rented for a money rental but that all the leases coming to his knowledge had been "on the shares." This witness further explained that the Anderson trap "was a trap that caught the fish, and she is the best trap there is in" that locality; that he "would be willing to pay the man \$50 a day for the use of that trap"; and that "I go on the basis of what catch she is making" when estimating the value of the trap. The weather conditions, according to all the evidence, were favorable. The foregoing is substantially all the evidence relating to the value to the use of the trap.

The defendant contends that it was error to receive evidence of the average catch of the Anderson trap before and after the accident; that the testimony about the catch made by other traps, located above and below the Anderson trap, was erroneous. The defendant took the position that the occupation of a fisherman is uncertain and precarious and that his profits are necessarily speculative and for that reason the defendant requested, but the court refused to give, the following instruction:

“The value of the fish-trap of the plaintiff, if you should find that the plaintiff is entitled to recover is a matter of easy determination, and inasmuch as the trap is put in for one season only, I charge you that the measure of damages for the use of the trap is interest upon such value as you may find the trap to have had at the time of this injury for such period as you may deem reasonable, but not over the period of one year at the rate of six per centum (6%).”

The law aims to allow full and complete compensation to an innocent party who has been damaged by the breach of a contract or the commission of a tort. In practice, the law does not prove false to its theory by banning profits merely because of their nature as profits; but upon the contrary the law endeavors faithfully to realize its aim by allowing compensation for profits which it is reasonably certain would have been made if the wrong complained of had not been done: *Allison v. Chandler*, 11 Mich. 542 (8 R. C. L. 501); *Bredemeier v. Pacific Supply Co.*, 64 Or. 576 (131 Pac. 312); *Fields v. Western Union Tel. Co.*, 68 Or. 209, 217 (137 Pac. 200); *McGinnis v. Studebaker*, 75 Or. 519 (146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917B, 1190, L. R. A. 1916B, 868); *Feeney & Bremer Co. v. Stone*, 89 Or. 360 (171 Pac. 569, 174 Pac. 152); *Fletcher v. Fischer*, 93 Or. 265 (182 Pac. 823). In the absence of malice the law endeavors to compel reparation rather than punishment. When attempting to compel reparation the difficulties encountered by the administrators of the law consist in the application rather than in the interpretation of the rules prescribed for the measurement of damages. There is no single rule applicable alike to all cases, involving profits which may be taken into account, when fixing the amount of compensation for the breach of a con-

tract or the commission of a tort. In some cases profits constitute either the sole or one of the elements of damages and therefore are to be taken as the measure of the amount of compensation; and in other cases profits constitute only an item of evidence to be taken into consideration, together with other evidence, by the jury when fixing the amount of compensation.

If the complaint is strictly construed, it must be interpreted to mean that the plaintiff is suing for profits as an element of damages, and hence if entitled to recover on his theory of the case he would be entitled to have this element of damage measured by the amount of the profits. The instruction of the court, however, is based on the theory that the plaintiff is entitled to recover the value of the use of the trap, and we think that the theory of the trial court is correct and in harmony with the principle which supports the holding in *Williams v. Island City Milling Co.*, 25 Or. 573 (37 Pac. 49). One witness testified that he never knew of a trap having been rented for a money rental, and hence it may be that the trap does not have a rental value in the same sense that the words "rental value" are used when referring to a storeroom or a dwelling-house in a city; and yet the trap did have a usable value. The trap was usable for only one purpose and it was valuable for that and no other purpose, and the damages must, in order to award compensation, be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Past results ought to be of some aid in fixing the usable value, and in the very nature of things one of the first inquiries that one would naturally make when estimating the usable value of the trap would be: How many fish did the trap catch? Admission of evidence concerning the catches made by the trap before the

injury is fully supported by the doctrine stated in *Williams v. Island City Milling Co.* See, also, the luminous opinion in *Standard Supply Co. v. Carter*, 81 S. C. 181 (62 S. E. 150, 19 L. R. A. (N. S.) 155). While the past success of the trap is not controlling, it is nevertheless one of the factors which may be taken into consideration, not as the measure of damages, but to aid the jury in estimating damages: *Post v. Munn*, 4 N. J. L. (1 Southard's Rep.) 61, 63, (7 Am. Dec. 570); *Wood Transfer Co. v. Shelton*, 180 Ind. 273 (101 N. E. 718). See, also, *Jacobs v. Cromwell*, 216 Mass. 182 (103 N. E. 383).

That there was a good run of fish during the two weeks is evidenced, the plaintiff says, by the fact that the weather conditions were good, by the significant circumstance that other traps in the same locality, but less favorably situated than the Anderson trap, caught each day "up to a couple of tons a day," and by the important fact that when the Anderson trap was repaired it caught each day from 1,600 to 1,700 pounds of fish. Does not this evidence of the catches made during the two weeks as well as the catches made immediately afterwards serve to make more certain any inference of usable value that may be drawn from prior results? Obviously the testimony about the run and catch of fish during the two weeks when the trap was out of repair and the catches made by the Anderson trap when again put in repair constituted data which would be very helpful in fixing the usable value of the trap for those two weeks. The fishing season is of comparatively short duration, and consequently the usable value of the trap might be negligible at one time of the year and considerable at another. In brief, the evidence under discussion was competent, not for the purpose of measuring the com-

pensation to be paid to the plaintiff, but for the purpose of aiding the jury in estimating the usable or rental value of the trap.

There are other exceptions presented by the record, but since the questions arising out of them are not likely to recur upon a retrial, we deem further discussion unnecessary.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and BURNETT and BENSON, JJ.,
concur.

Rehearing denied November 25, 1919.

PETITION FOR REHEARING.

(185 Pac. 231.)

Respondent's petition for rehearing denied.

DENIED.

Messrs. Malarkey, Seabrook & Dibble, for the petition.

Messrs. Teal, Minor & Winfree, contra.

HARRIS, J.—In the original opinion we ruled that instruction No. 8 made it necessary to reverse the judgment. The plaintiff earnestly insists in the petition for a rehearing that—

Instruction No. 8 which was given at the request of plaintiff, "is merely a statement with which everyone will agree, namely, that it was the duty of appellant to operate and navigate its vessel where vessels should be operated and navigated."

The petition for a rehearing contains no new argument, for at the hearing as well as in his printed brief, the plaintiff vigorously contended that instruction No. 8 was devoid of error and the reasons given for that contention were the same as those now assigned by him. However, we have again examined and considered the record with the same result as before. As stated in the original opinion this instruction was not a parenthetical statement, but upon the contrary it stood out as boldly and prominently as any other instruction. When instruction No. 8 is viewed in the light of the allegation that

“although there was at said time and place a fixed channel and course in which vessels navigating said river should be operated, said defendant carelessly and negligently failed to keep and to maintain said tugboat within the limits of said channel and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel,”

and when this instruction is viewed in the light of the evidence concerning the location of the course usually followed by vessels, it appears manifest to us that the instruction in effect stated to the jurors that it was the duty of the defendant to navigate its flotilla in the channel and course usually taken by boats.

Among other instructions, the court gave, at the request of the defendant, instruction No. 29, which reads as follows:

“Vessels navigating the Columbia River are not required to keep in the dredged channel, where there is a dredged channel, nor in the center of the navigable channel. For instance, you may legally and without negligence navigate any part of the navigable channel of said river where the depth of water is sufficient therefor.”

The plaintiff now argues, just as he contended in his printed brief, that instruction No. 8 is not prejudicial when considered in connection with instruction No. 29. The answer to this argument is that one instruction is inconsistent with the other. Construing instruction No. 8 as we do, then the inevitable conclusion is that this instruction was prejudicial error. We adhere to the original opinion and the conclusion there reached.

The petition for a rehearing is denied.

REVERSED AND REMANDED. REHEARING DENIED.

(Argued October 17, affirmed November 25, 1919.)

NEWSOM v. CITY OF RAINIER.

(185 Pac. 296.)

Municipal Corporations—Invalidity of Perpetual Franchise.

1. A franchise ordinance granting a right to lay and protect water-mains in the streets and alleys of the town "so long as this contract shall remain inviolate" constitutes a perpetual utility franchise, and hence is invalid.

Waters and Watercourses—Franchise in Streets—Forfeiture.

2. A franchise contract between a city and another for the laying and protection of water-mains, providing that the rights and privileges thereunder might be forfeited by any future council upon failure to supply a sufficient amount of water, is within the rights of the parties who may thus contract about the remedy for breach.

Waters and Watercourses—Legislative Power of Council to Declare a Franchise Void by Ordinance.

3. The city council is a legislative body, and, in respect to perpetuating or ending a water supply franchise ordinance containing a provision that rights thereunder might be forfeited by the council for breach, could forfeit such rights only by means of a repealing ordinance declaring the franchise ordinance void.

Constitutional Law—Waters and Watercourses—Council's Legislative Act in Forfeiting Franchise Contract Binding upon Court—Obligation of Contracts.

4. Where a franchise ordinance conferred express authority upon a city council to revoke the franchise when in its judgment it had

been breached, the findings upon which it must be concluded that council acted in passing the ordinance annulling and revoking the franchise ordinance are binding on the court, and the court would impair the obligation of the contract if it disregarded council's action.

From Columbia: JAMES A. EAKIN, Judge.

Department 1.

On October 5, 1896, the town of Rainier by its common council enacted Ordinance No. 26, granting to the plaintiff or Dean Blanchard, their successors and assigns, the right to lay and protect water-mains in the streets and alleys of the town, "so long as this contract shall remain inviolate," all in consideration of the grantees' agreeing to lay such pipes for the purpose of supplying water to the town and its inhabitants. Certain restrictions were made upon the maximum rates to be charged. Section 3 of this ordinance reads thus:

"All rights and privileges conferred by this ordinance may be forfeited by any future council upon a failure to supply a sufficient amount of water for legitimate household purposes, provided this shall not apply in cases of temporary and unavoidable leaks or breaks in the water plant."

The town reserved the right to purchase the plant upon an appraised value to be determined by arbitrators. The plaintiff claims to have accepted this ordinance and to have established a water system in the town, and that in 1909 the city passed an ordinance providing certain restrictions upon excavation in the streets and alleys and requiring an application to be made to the city recorder for permission therefor. He avers that he complied with the ordinance and that the officers of the city without cause have refused to grant him permission to make necessary excavations

for the extension of his water system and have forcibly prevented him from performing the work. He prays for an injunction restraining them from interfering with the laying of water-mains and pipes in the town.

The city contends in its answer that the ordinance is void because it purports to grant a franchise in perpetuity. It is also stated as a further defense that after the plaintiff had refused to enlarge his system to make it adequate for the needs of the people in the municipality, the common council of the town passed ordinances repealing Ordinance No. 26 and revoking all of the rights which the plaintiff claimed thereunder. There are other statements of defensive matter not necessary to be noticed.

The plaintiff demurred to all of these separate defenses, but his demurrers were overruled and, as he refused to plead further, the Circuit Court entered a decree dismissing his suit, and he has appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. M. B. Meacham*.

For respondents there was a brief with oral arguments by *Mr. Arthur I. Moulton* and *Mr. Fred W. Herman*.

BURNETT, J.—1. One of the principal questions to be considered is the validity of the franchise embodied in Ordinance No. 26. It will be observed that no limitation of time is contained in the enactment, but it will continue so long as the grantees comply with its terms. This constitutes a plain perpetuity within the meaning of *City of Joseph v. Joseph Water Works Co.*, 57 Or. 586 (111 Pac. 864, 112 Pac. 1083). The court

there, speaking by Mr. Chief Justice EAKIN, held that a municipality has no authority to grant a perpetual utility franchise. This being so, the ordinance conferred no right upon the plaintiff, and within the meaning of that principle he has no standing to assert any claim for relief against the city based on that enactment of its common council.

2, 3. Another proposition is equally conclusive against the plaintiff. The ordinance which he accepted, and under which he claims, constituted a contract or franchise between the city and himself. As one remedy for a breach of its terms on his part, they provided in Section 3 that—

“All rights and privileges conferred by this ordinance may be forfeited by any future council upon a failure to supply a sufficient amount of water for legitimate household purposes.”

The parties had a right thus to contract about the remedy for noncompliance with the conditions of the franchise. There is nothing unlawful about such a contract and, as said in *Breitenbach v. Bush*, 44 Pa. St. 313 (84 Am. Dec. 442):

“If the parties adjust or modify the legal remedies for themselves by making them an express and substantive part of their contract, they cannot, as to that particular contract, be changed by the legislature.”

No more can the court disregard the line of conduct which the parties lawfully have marked out for their intercourse with each other. The council is a legislative body and in respect to perpetuating or ending the ordinance in question it must act in its legislative capacity. Consequently, the only method by which the council could forfeit the rights conferred by the ordinance was by another ordinance repealing it or declaring it void. This was within the contemplation of the

parties at the time they entered into the convention in question.

4. It is said in 8 Cyc. 727:

"Where the questions involved are of a political character and action depends upon a construction to be given a constitutional provision or statute, courts will not only give great consideration to construction of such provisions or statutes by the political departments of the government in doubtful cases, but they are bound by such constructions where the power is of a discretionary character and making those who are called upon to exercise those powers, in the first instance judges of questions of fact and existing conditions."

An instance illustrating this principle is found in the original Constitution of this state whereby the legislature was authorized to create a separate Supreme Court, "when the white population of this state shall amount to 200,000." In *Cline v. Greenwood*, 10 Or. 230, the court, speaking by Mr. Justice LORD, respecting this constitutional provision, said, "that section of the Constitution can only be made operative by legislative action." Another instance of the principle is found in the doctrine that the Governor is the exclusive judge of the facts requiring an extraordinary session of the legislature: *Farrelly v. Cole*, 60 Kan. 356 (56 Pac. 492, 44 L. R. A. 464); *State v. Fair*, 35 Wash. 127 (76 Pac. 731, 102 Am. St. Rep. 897).

Having committed the annulment of this franchise to the legislative body of the city, viz., the council, the court would not necessarily be called upon to enforce the forfeiture. We are bound to presume that the council, thus clothed with authority by the express stipulation of the parties, ascertained facts warranting a cancellation of the franchise, and its findings, upon which we must conclude that it acted, are bind-

ing upon us and we would impair the obligation of the contract if we disregarded the action of the body to which the parties committed this prerogative. Of course, if no provision had been made about the manner in which the forfeiture of the franchise might be effected, it would have required a judicial procedure to accomplish that end, based upon the violation of its terms by the grantee. But the present instance is not such a case. Neither is it like *State ex rel. v. Birmingham Water Works Co.*, 185 Ala. 388 (64 South. 23, Ann. Cas. 1916B, 166):

“The municipal ordinance or resolution which grants a franchise to a public service corporation may also comprehend the terms of a contract between the municipality and the service corporation, prescribing the obligations and restraints by which each is to be governed, and the conditions upon which the franchise is granted and may be exercised. In so far as such an ordinance is merely contractual in its nature, it is subject to revocation or rescission for such material breaches of its terms as would justify the rescission of other contracts by offended parties in interest. * * But in so far as it grants a franchise, or consents to the exercise of a franchise granted on that condition by the state legislature, it cannot, at least in the absence of express authority, be revoked by the municipality for the grantee’s misconduct so as to annul the franchise—a result which can be accomplished only by judicial action at the instance of the state, or contingently at the suit of the municipality.”

In the present juncture, however, an express authority has been conferred upon the council to revoke the franchise when in its judgment the conditions have arisen warranting such an action. The conclusion is that the Circuit Court was right also in overruling the demurrer to the defense based upon the repeal of the ordinance granting the franchise. It is unnecessary

to determine the validity of the court's ruling upon the demurrers to the other defenses.

The decree is affirmed.

AFFIRMED.

BENSON, BEAN and HARRIS, JJ., concur.

Motion to dismiss appeal allowed November 25, 1919.

STATE v. WHITE.

(185 Pac. 298.)

Criminal Law—Appeal—Extension of Time to Prepare Bill of Exceptions.

1. An order extending the time for defendants in an arson case to prepare and lodge a bill of exceptions does not extend the time for filing the transcript on appeal.

From Yamhill: **HARRY H. BELT, Judge.**

In Banc.

Motion to dismiss appeal allowed.

APPEAL DISMISSED.

Mr. R. L. Conner, for the motion.

Messrs. McCain & Vinton, contra.

McBRIDE, C. J.—1. This is a motion to dismiss an appeal. On March 7, 1919, defendants were duly convicted of the crime of arson and sentenced to confinement in the penitentiary for a period of not to exceed two years. At the time of pronouncing said judgment the court granted the defendants to and including March 12, 1919, in which to prepare and file a motion for a new trial, and on March 31, 1919, the motion for a new trial was overruled. On the latter date defend-

ants served and filed a notice of appeal and procured from the court an order giving them until May 30, 1919, in which to prepare and lodge a bill of exceptions, and twenty days thereafter, which would be until June 20, 1919, in which to file the transcript on appeal in the Supreme Court. On May 29, 1919, the court further extended the time for filing the bill of exceptions until and including July 1, 1919, and allowed defendants twenty days thereafter, or until July 21, 1919, in which to file the transcript. No further or additional time was granted defendants within which to file their transcript on appeal here. On June 28, 1919, the court made an order giving defendants until July 20, 1919, within which to lodge their bill of exceptions, and on August 6th the court made a similar order extending the time to lodge the bill of exceptions until August 15, 1919; but neither of these orders purported to extend the time previously granted for filing a transcript in this court. No request was made to the clerk to prepare and file a transcript on appeal until August 6, 1919, which was sixteen days after the expiration of the time granted by the last order of the court for that purpose. The order extending the time for defendants to prepare and lodge the bill of exceptions did not extend the time for filing the transcript: *Robinson v. Robinson Cheese Co.*, 50 Or. 453 (93 Pac. 253).

It follows the appeal must be dismissed and the judgment of the Circuit Court affirmed, and it is so ordered.

APPEAL DISMISSED.

Argued October 17, affirmed November 25, 1919.

JOYNER v. CROWN WILLAMETTE PAPER CO.

(185 Pac. 299.)

Appeal and Error—Review of Weight of Evidence.

1. Under Constitution, Article VII, Section 3, as amended in 1911, the Supreme Court is prohibited from passing upon the comparative weight of the evidence adduced on a trial.

Limitation of Actions—Evidence Showing Action for Injury not Barred.

2. In an action by a servant for personal injury, evidence held sufficient to sustain a finding that plaintiff was injured in January, 1916, and not in December, 1915, so that limitations had not run.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

This is an action for damages alleged to have been received by plaintiff while working as an employee of defendant in its mill at Oregon City.

The complaint alleged that by reason of certain negligent omissions of defendant, plaintiff was injured in his back, whereby he sustained damages in the sum of \$2,899.99; that said accident occurred on January 3, 1916. The complaint was filed December 26, 1917. The defendant answered by a general denial, and also pleaded the statute of limitations, alleging that the accident occurred on the third day of December, 1915, and was therefore barred by the provisions of Section 8, L. O. L., Chapter 2, which provides a limitation of two years in this class of actions.

There was a jury trial and a verdict and judgment for plaintiff for \$1,500, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Bert W. Henry* and *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Henry*.

For respondent there was a brief over the name of *Messrs. Brownell & Sivers*, with an oral argument by *Mr. Charles T. Sivers*.

McBRIDE C. J.—While the objection urged upon the appeal is presented here, as it was to the court below, in many different forms, the real objection is directed to the one central proposition, namely: Was there *any* evidence to justify the verdict? It is not contended that there was an absence of evidence tending, at least in some degree, to show that plaintiff was injured and that the negligence of defendant contributed to the injury. It is claimed that defendant conclusively showed that the injury occurred in December, 1915, instead of January, 1916; that there was no evidence to show that it occurred in January, 1916, and that, therefore, defendant's plea of the statute of limitations was sustained.

1. Article VII, Section 3, of our Constitution, as amended in 1911, among other things, provided that "no fact tried by a jury shall be otherwise re-examined in any court of the State, unless the court can affirmatively say there is no evidence to support the verdict." Under this provision the appellate court is prohibited from passing upon the comparative weight of the evidence adduced, and it is necessary only to consider the evidence on behalf of plaintiff in the case at bar to determine whether there was *any* evidence tending to show that the accident occurred in January, 1916. Plaintiff's testimony on this subject is as follows:

"Q. What were you doing on or about the third day of January, 1916?

"A. Trucking at the Crown-Willamette Pulp & Paper Company.

"Q. At their mill, where?

"A. On this side of the river, at the old crown.

"Q. In Oregon City, Oregon?

"A. Yes, sir.

"Q. Just tell the jury what occurred on that day at your work.

"A. Well, I went to work at 12 o'clock—

"Q. At night?

"A. At night. [Plaintiff then described how he received his injuries on that night.]

"Q. I said you visited the doctor on December 3d, the day of the injury?

"A. No, sir, not to my knowledge. It was January 3, 1916.

"Q. January 3, 1916?

"A. Yes, sir; that was the time. I remember it.

"Q. That was the date of the injury?

"A. Yes, sir.

"Q. January 3, 1916?

"A. Yes, sir; that is my best knowledge of it."

On cross-examination the witness testified as follows:

"Q. You were in his office [referring to the office of the physician who attended him] on December 3d, the day of the injury?

"A. Yes, sir, that morning.

"Mr. Sivers (of Counsel for Plaintiff): I don't think he understood that question.

"A. Witness: No, sir, I don't understand you.

"Q. I said that you visited the doctor on December 3d, the day of the injury.

"A. No, sir, it was January 3, 1916.

"Q. January 3, 1916?

"A. Yes, sir, that was the time. I remember it.

"Q. That was the date of the injury?

"A. Yes, sir.

"Q. January 3, 1916?

"A. Yes, sir, that is my best knowledge of it."

Plaintiff's wife testified that "as near as she could remember" the injury occurred on the morning of

January 3, 1916, that she could be mistaken as to the date, but did not think so.

2. This was practically all the evidence introduced by the plaintiff as to the date of the accident. We assume that no lawyer would say that at the close of this testimony there was no evidence to submit to the jury, which tended to show that the plaintiff was injured on January 3, 1916. In the absence of contradictory evidence that fact was established almost conclusively.

This testimony was flatly contradicted by the records kept by the clerk in the office of the physician, to whom plaintiff applied for treatment, by the books of the defendant and by the oral testimony of several witnesses, but the fact remains that this is a case where there was contradictory testimony, the value and effect of which the jury were the sole judges.

No question is made as to the fairness of the instructions. The jury saw fit to believe the testimony of the plaintiff and his wife, as to the date of the injury, and to reject that offered by the defendant; and to disturb their verdict on the ground that they refused to find in conformity with the great preponderance of the evidence would be for this court to do just what the constitutional provision above quoted says we shall not do, namely: re-examine the case for the purpose of weighing contradictory evidence.

We feel ourselves bound by the verdict both as to the date of the injury and the amount of damages awarded. The judgment is affirmed. **AFFIRMED.**

BURNETT, BENSON and HARRIS, JJ., concur.

Argued September 26, affirmed October 7, rehearing denied December 2, 1919.

HURST v. LARSON.

(184 Pac. 258.)

Customs and Usages—Not Admissible to Add to or Contradict Contract.

1. Under Section 727, subdivision 12, L. O. L., evidence of usage is admissible only as a means of interpreting act, contract or instrument, where true character thereof is not otherwise plain, and is not admissible to add new terms or stipulations to contract or contradict explicit terms thereof.

Customs and Usages—As to Duty of Buyer of Potatoes to Furnish Car.

2. Where contract for sale of potatoes did not specify who was to furnish the means of transportation, evidence of a custom requiring buyer of less than a carload of potatoes to furnish car was admissible under Section 727, subdivision 12, L. O. L.

Customs and Usages—Incorporation of General Custom in Written Contract Unnecessary.

3. A general custom known to both contracting parties respecting the subject matter of their stipulation is in a certain sense a law covering them, so that it is not necessary to mention it in writing.

Costs—On Verdict in His Favor, Defendant Entitled to Costs and Disbursements.

4. Where verdict was adverse to plaintiff, defendant was entitled to judgment for costs and disbursements.

[As to charges recoverable by prevailing party, see note in 88 Am. Dec. 187.]

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2.

The plaintiff, contending that he has been and is ready, able and willing to perform his part of the agreement hereinafter mentioned, charges that the defendants have refused to deliver the property for which he contracted. The contract is as follows:

“W. S. Hurst & Co. have this day bought from E. A. Larson and H. Larson of Molalla and the said E. A. Larson and H. Larson have this day sold to said W. S. Hurst & Co. the following: 300 sacks Burbank pota-

toes, at 90c per 100 lbs., to be delivered f. o. b. Liberal and shipped to the said W. S. Hurst & Co., at Portland. The above potatoes to be sound, merchantable goods, free from imperfections, cuts, culls, knobby or rough, ill shaped stock, and to be well sorted to common quality and in size not less than 3 inches in length and — in diameter. Must be sacked in good, sound, clean No. 1 second hand sacks. Sacks to be full mouthed and to average 115 pounds per sack.

“Remarks: Sacks to be furnished by buyers. Delivery to be made on or before Nov. 15, buyers’ option.

“E. A. LARSON,

“HANS LARSON,

“Seller.

“Paid on account ———.

“Dated at Canby, this 29th day of Sept., 1916.

“W. S. HURST & Co.,

“Sellers.

Among other things, after admitting the execution of the instrument, the defendants answer as follows:

“That at the time of signing said alleged agreement it was the custom of plaintiff and for two or three years last past it had been the custom of plaintiff and of other buyers of potatoes to purchase from farmers and producers in and around, Liberal, Canby and other nearby points in Clackamas County, Oregon, potatoes grown individually by said farmers and producers, in less than carload lots, and at the time of shipping the same plaintiff and other buyers would furnish a car for loading the same, and then notify said farmers and producers who would then load their potatoes in the cars so furnished by plaintiff and other buyers, thereby making full carload lots, which said custom was known to plaintiff and his agents and to said defendants at the time of signing said agreement, and said alleged contract was made with reference to such usage and custom.

“That the said 300 sacks of potatoes referred to in said alleged agreement were and are less than a carload lot.”

This matter was traversed by the reply. The trial in the Circuit Court resulted in a verdict and judgment for the defendants. The plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Paul C. Fischer* and *Messrs. Sever & Cooke*, with oral arguments by *Mr. Fischer* and *Mr. Herbert A. Cooke*.

For respondent there was a brief and an oral argument by *Mr. O. D. Eby*.

BURNETT, J.—The assignments of error are three. The first two are based upon the admission of the testimony of the two defendants respecting the custom alluded to in their answer. The third is predicated upon the entry of judgment against the plaintiff and in favor of the defendants for the costs and disbursements incurred. In effect, the testimony of E. A. Larson, defendant, on the subject of custom was that it had been the practice in the vicinity where he resided and the potatoes in question were produced, for the buyer to furnish the cars for their transportation, in all cases that he knew of, and that the farmers there raise small tracts of potatoes and the buyer orders the car and informs the grower when he gets the car there ready for loading. The testimony of the other defendant was practically the same.

1. It will be observed that the contract requires the potatoes to be delivered by the defendant "f. o. b. Liberal, and shipped to the said W. S. Hurst & Co. at Portland." It is silent about the means of carriage on board which the produce was to be placed, or who was to furnish the same. Under our statute, L. O. L., Section 727, subdivision 12, evidence may be given of

“usage, to explain the true character of an act, contract or instrument where such true character is not otherwise plain. But usage is not admissible except as a means of interpretation.” It is plain, therefore, that no new terms or stipulations can be added to a contract by proof of usage. Neither can the plain, explicit terms of a written agreement be contradicted by such testimony. It is otherwise where it is not plain what the true character of the instrument is, or where the stipulation is silent upon something necessary to the complete performance thereof. In *Holmes v. Whitaker*, 23 Or. 319, 324 (31 Pac. 705, 706), speaking of the silence of the contract respecting who should furnish the boat upon which the property which was the subject of sale was to be transported, it is said:

“Hence, proof of usage or custom, if any prevailed, is admissible to supply these details upon which the contract is silent; if such usage or custom was known to the plaintiffs at the time the contract was made.”

2. In the feature under consideration the *Holmes-Whitaker* case is not materially different from the one in hand, and hence it was competent here to take the testimony of the defendants respecting the custom governing such matters, and it was a proper issue in the case upon which the defendants were entitled to give evidence.

3. Much reliance is placed by the plaintiff on the case of *Culp v. Sandoval*, 22 N. M. 71 (159 Pac. 956, L. R. A. 1917A, 1157), holding in effect that where an individual has agreed to perform an act, whatever is necessary to such performance is a part of the agreement and it is implied that he must furnish the means of accomplishing the act; hence, when a vendor has contracted to sell goods f. o. b. cars, he must procure the

cars and load the goods thereon. That precedent is not applicable to the present contention, because in that case no custom was pleaded, while here it is stated in defense that the custom existed and was known to the plaintiff, so that if this be true it must have entered into the negotiations of the parties automatically without express mention of it. By analogy it may be said that a general custom known to both contracting parties respecting the subject matter of their stipulation is, in a certain sense, the law governing them, so that it is not necessary to mention it in the writing. Or, as said in *Sawtelle v. Drew*, 122 Mass. 229, quoted with approval in the Holmes-Whitaker case:

“A custom within the meaning of the law, if general, is incorporated into and becomes a part of each contract to which it is applicable; if local, of every contract made by parties having knowledge of or bound to know its existence.”

There was no error in receiving the testimony of the defendants about the custom.

4. The verdict was adverse to the plaintiff. No exception is noted respecting the rulings of the court prior to the rendition of the verdict, except the objections to the testimony already considered. These being unavailable, the judgment for the defendants for costs and disbursements follow as a necessary consequence, so that there is no error to be predicated on the third assignment.

The judgment is affirmed.

AFFIRMED.

BEAN, BENNETT and HARRIS, JJ., concur.

Argued October 28, affirmed December 2, 1919.

GOYNE v. TRACY.

(185 Pac. 584.)

Costs—Judgment for Costs Without Service of Bill.

1. A justice of the peace could render judgment for costs and disbursements without the costs bill having been served.

Justices of the Peace—Harmless Instruction That Three Fourths of Jury Could Return Verdict.

2. Instruction by justice of the peace to the jury that three fourths of their number would be sufficient to agree upon a verdict was harmless, where the verdict returned in fact was unanimous.

Justices of the Peace—Assessment of Amount of Recovery.

3. Under Section 156, L. O. L., in an action for the recovery of money the jury must assess the amount of recovery, and a verdict which merely found for plaintiff did not give the justice of the peace authority to render judgment on it, but he should have caused the jury to correct it, or have sent the jury out again, pursuant to Section 150.

Justices of the Peace—Improper Rendition of Justice's Judgment on Verdict.

4. Justice of the peace having had no authority to render judgment in an action for the recovery of money on the jury's verdict merely finding for plaintiff and not assessing the amount, and such error appearing on the record, there is presented a question amenable to the right of review under Section 605, L. O. L., providing that writ of review shall be concurrent with the right of appeal, etc.

Justices of the Peace—Power of Circuit Court to Direct Justice of the Peace.

5. Where the record before the Circuit Court on return of writ to review judgment of a justice showed judgment improperly rendered on verdict in an action to recover money not assessing the amount, but merely finding for plaintiff, the Circuit Court, under Section 611, L. O. L., had power to affirm, modify, reverse or annul the decision, or by mandate to direct the inferior court to proceed according to its decision.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The defendant Tracy sued the plaintiff here in the Justice's Court for money had and received by the defendant in the amount of \$213.05. The present plain-

tiff by her answer denied every allegation in that complaint. At the trial after the jury had retired to consider their verdict they returned and asked the court to instruct them relative to the number required to agree upon a verdict and the justice instructed them that three fourths of their number would be sufficient for that purpose. Afterwards they returned a unanimous verdict as follows:

“We the jury in the above-entitled action find for the plaintiff.”

Before the judgment was rendered, defendant there and plaintiff here objected to the rendition of any judgment in favor of plaintiff in that action except for costs and disbursements. This objection was overruled and the justice of the peace entered a judgment in favor of the plaintiff and against the defendant for \$213.05, the full amount claimed, together with costs and disbursements taxed at \$32.05. The defendant in that proceeding sued out this writ of review, alleging as error that the court had no right to render any judgment on such a verdict; that it erred in instructing the jury and likewise that it was wrong to render judgment for costs and disbursements without the cost bill having been served. The Circuit Court sustained the writ and directed the defendant to restore to the custody of the Justice's Court the money realized by attachment and remanded the case for a new trial in the Justice's Court. The defendants in the review proceedings have appealed. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. L. Denham*.

For respondent there was a brief and an oral argument by *Mr. R. J. Green*.

BURNETT, J.—1-4. There is no merit in the objection that the cost bill was not served. It is not required: *Egan v. North American Loan Co.*, 45 Or. 131, 139 (76 Pac. 774, 77 Pac. 392). If it was error at all, the instruction of the justice of the peace to the jury was harmless for it appeared by the record that the verdict was unanimous. This being an action for the recovery of money it is required by law that the jury shall assess the amount of recovery: Section 156, L. O. L. The verdict in question did not conform to this statute and hence gave the justice no authority to render a judgment upon it. The justice should have caused the jury to correct it or have sent the jury out again: Section 150, L. O. L. Having no authority to render judgment on such a verdict and the error appearing on the face of the record there is presented a question amenable to the right of review under Section 605, L. O. L.:

“The writ shall be concurrent with the right of appeal and shall be allowed in all cases where the inferior court, officer or tribunal in the exercise of judicial functions appears to have exercised such functions erroneously or to have exceeded its or his jurisdiction to the injury of some substantial right of the plaintiff but not otherwise.”

5. With this record before it on the return of the writ of review the Circuit Court under Section 611, L. O. L., had power to—

“affirm, modify, reverse or annul the decision or determination reviewed and if necessary to award restitution to the plaintiff or by mandate direct the inferior court, officer or tribunal to proceed in the matter reviewed according to its decision.”

The jury having been discharged it is too late to amend the verdict. Hence, under the sections of the

Code already mentioned, the action of the Circuit Court, in remanding the case for further proceedings was appropriate and is affirmed. **AFFIRMED.**

Argued at Pendleton October 28, affirmed December 2, 1919.

BOSMA v. HARDER.

(185 Pac. 741.)

Husband and Wife—Fund Accumulated During Marriage Separate Property of Husband.

1. Where fund was accumulated in Oregon and was in possession of husband, who, when he and his wife moved to Idaho, deposited it there in his own name and husband subsequently withdrew it from the Idaho bank and placed it in possession of a brother in Oregon, *held* that the fund remained the separate property of the husband, in view of Section 799, subdivisions 4, 11, 12, 19, and Sections 7034, 7044, 7045, 7050, L. O. L.

Evidence—Declaration of Deceased.

2. Declaration of deceased husband when he transferred money in the shape of a certificate of deposit in the Idaho bank that it was his own money was admissible.

Husband and Wife—Separate Property Taken to Community Property State.

3. Separate property, acquired in a state where community property is unknown, does not become community property, but remains separate property when transported into a community property state.

[As to the effect of removal into community property state on separate property rights theretofore acquired, see notes in 13 Ann. Cas. 840.]

[As to the law governing the community property rights of wife, see note in 85 Am. St. Rep. 564.]

Husband and Wife—Gift of Separate Property of Husband Valid Against Wife.

4. Where fund was accumulated in Oregon and was in possession of husband, who when he and his wife moved to Idaho deposited it there in his own name, and husband subsequently withdrew it from the Idaho bank, and of his own accord gave it to his brothers in Oregon, *held* gift was valid against wife.

Husband and Wife—Gift of Community Property by Husband Valid.

5. Under Revised Codes of Idaho, Section 2686, providing that husband has management and control of community property with like

absolute power of disposition as he has of his separate estate, except as regards homestead or community property occupied as a residence, an absolute unrestricted gift by a husband to his brothers of money is valid against wife though the money be treated as community property.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

The substance of the plaintiff's complaint is that in 1909, while she and her then husband, Charles Harder, were residing in the State of Idaho they had some domestic trouble in consequence of which she was preparing to institute a suit against him for a divorce, together with separate maintenance and alimony out of his property. Pending this, all of which was within the knowledge of both Charles Harder and his brother, the defendant herein, her husband procured from the First National Bank of Caldwell, Idaho, a draft on the First National Bank of Portland, Oregon, for \$10,713, paying for the same out of money deposited in the Caldwell bank and which belonged to her and him as community property under the laws of Idaho, and in pursuance of a conspiracy between himself and the defendant, took it to Portland, Oregon, cashed it and transferred the proceeds to another bank under an assumed name, where he placed it to the credit of a bank at Haines, Oregon, owned exclusively by the defendant, by means of which it afterwards came into the possession and custody of the defendant, all with the intent to conceal the property, to prevent the plaintiff from obtaining alimony and maintenance out of the same and to defraud her out of the same. She charges also that the money was put into the possession of the defendant for the trust and benefit of her husband, to be delivered to the latter at his request and demand, and that the defendant still holds the same in such

trust for the benefit of Charles Harder, his heirs and legal representatives.

She further says that her husband died intestate at Boise, Idaho, October 20, 1910, being at the time a resident of that state and having therein an estate consisting of both real and personal property, leaving no children surviving him, and that she herself was the sole and only heir at law. By appropriate allegations she sets forth a history of the proceedings in probate whereby she, as administratrix, settled the estate of her husband and obtained a decree of the probate court in Idaho awarding her all the estate of her husband, in whatever form the same then was remaining after the settlement of claims against the estate. She alleges that under the laws of that state she was entitled, as the heir of her husband, to all of the community property and to the residue of his estate remaining after the liquidation of claims against the same. She says also that prior to his death, she and her husband became fully reconciled; that no proceedings in divorce were ever instituted by either against the other and that she did not learn of the disposition of the money already mentioned until after his death.

Her prayer in substance is that the defendant be declared to be a trustee for her benefit and that she have judgment against him for the money, together with interest from June 7, 1909, that being the date when he came into possession of the money.

The answer denies all fraud and conspiracy, challenges the allegation that the money involved was community property, traverses her allegation that she was the sole heir, because the parents of her husband were still living at the time of her husband's death, denies the wrongful holding of the money by the defendant as alleged in the complaint, and generally puts at issue

the allegations whereby the plaintiff seeks to charge the defendant with responsibility for the money or any part thereof.

Affirmatively, the answer avers in substance that on December 25, 1909, Charles Harder was the owner in his own right in severalty of the money in dispute, all of which had been accumulated in the State of Oregon prior to the removal of himself and the plaintiff to the State of Idaho, and that on the date last mentioned, in the State of Oregon, he gave the entire sum of \$10,937 and the actual possession thereof to the defendant and three other brothers of Charles Harder, in equal parts, which gift they then and there accepted and took into possession and have ever since held and do now retain the title and possession thereof as their own. The answer charges that when Charles Harder so gave the money to his brothers he was and had for some time prior thereto been suffering from a mortal ailment from which he did not expect to recover, and did not recover, and which subsequently caused his death, and that on account of the fact that his then wife, the plaintiff herein, had for a long time theretofore been, and was then, grossly misconducting herself and brazenly misbehaving, he gave the money to his brothers with the intent then and there to part forever with all his right, title and interest therein. This pleading also avers that at the time of the gift the community property in the name of Charles Harder in the State of Idaho was of the actual value of \$8,000 and pleads the statute of Idaho on the subject of community property, to the effect that when a decedent dies intestate and leaves a surviving husband or wife and no issue, the whole of the community property descends to the surviving husband or wife; that prior to the death of either thereof both the husband and wife own an equal,

undivided one-half interest in the community property, and that finally:

“The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate”: Rev. Codes, Idaho, § 2686.

This pleading also states that Charles Harder died intestate and without issue, in Idaho, on October 20, 1910, and that pursuant to his directions when he made the gift of the money as stated, the whole sum thereof was equally divided and distributed among his said four brothers, long prior to the commencement of this suit. All this matter is pleaded in bar, and likewise the pleader separately stating the same draws the conclusion that there is a defect of parties defendant, in that the other three brothers are not included as defendants.

A third defense is that prior to the death of Charles Harder, the plaintiff had full knowledge of the fact that the money had been withdrawn from the First National Bank at Caldwell, Idaho, and delivered into the possession of the defendant, and that knowing all this at the time of issuance of letters of administration upon the estate of her deceased husband, she neglected to institute proceedings for the recovery of the money until some witnesses named in the pleading died, whereby the defendant has been deprived of their testimony to his injury; and at no time prior to the death of the witnesses did the defendant have any intimation that the plaintiff intended to claim any part of this money, or of any facts that could have put him on inquiry concerning such an intent.

The reply traverses the answer in material particulars.

The suit was tried before the Circuit Court of Baker County and findings and decree in favor of the defendant, dismissing the suit, resulted. The plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. McCulloch & Wood* and *Messrs. Jackson & Walters*, with an oral argument by *Mr. W. W. Wood*.

For respondent there was a brief over the names of *Mr. J. H. Nichols*, *Mr. J. L. Rand* and *Messrs. Smith & Smith*, with oral arguments by *Mr. Nichols* and *Mr. Wm. Smith*.

BURNETT, J.—The plaintiff and Charles Harder were married in Oregon in 1893. The testimony of the latter's brothers, who were familiar at that time with his holdings, is to the effect that he had property at time of his marriage of the value of \$7,000. The testimony of the plaintiff is the only evidence tending to dispute this. She and her husband, Charles Harder, lived at various places in the State of Oregon and finally, in 1907, they removed to Idaho and resided there until his death in 1910. He had taken with him to Idaho \$18,000 and deposited it in his own name in the First National Bank of Caldwell in that state. He invested about \$8,000 of this money in realty in Idaho, which he owned at the time of his death. It appears that the married pair had domestic trouble and the plaintiff sued her husband for divorce in the courts of Idaho. About that time Charles Harder, with the funds on deposit in the First National Bank of Caldwell, bought a draft on the First National Bank of Portland, Oregon, in the sum of \$10,713, which he took with him en route to Portland by train. On the way,

he communicated with his brother, the defendant, who was then engaged in banking at Haines in Baker County, asking the latter to meet him as he passed that place. In pursuance of this invitation, the defendant accompanied Charles Harder on the train to La Grande. While thus together, Charles Harder told the defendant that he was having trouble with his wife, the plaintiff; that she was very much infatuated, and was maintaining illicit relations, with one Hardenburg; that he was afraid the latter would kill him, and that he was determined to put the money in question beyond the reach of the plaintiff. He also told the defendant at the time that he, Charles, was on his way to Portland, where he would deposit money to the credit of the bank at Haines of which the defendant was then the proprietor, and for the defendant to take it, manage the fund and pay him such interest as he could afford. To this the defendant agreed. Charles continued his journey to Portland, parting from the defendant at La Grande. Arriving in Portland, he cashed the draft, withdrawing the amount in money, which he took to the Ladd & Tilton Bank and, adding thereto \$40, deposited the whole sum under the name of John Wilson to the credit of the Haines bank, and sent to his brother, the defendant, at Haines, the certificate of deposit. The defendant took charge of the fund, carried it to his individual account in the bank at Haines and allowed his brother Charles 4 per cent interest on the same. He used it until November 9, 1909, and on account of having more money than he could profitably employ at the time, he deposited it at his brother's direction in the First National Bank of Caldwell, Idaho, and took therefor a six months' time certificate of deposit drawing 5 per cent interest. The defendant retained this certificate of deposit, the face

of which amounted to \$10,937, until December 24th of that year. At that time Charles Harder had written the defendant asking him to join with him in a Christmas visit to their parents at Milton, Oregon. In pursuance of the arrangement, Charles Harder came to Haines and while there inquired of the defendant the condition of the fund. Thereupon the defendant indorsed the certificate of deposit in blank and gave it to Charles Harder, who took it with him to Milton. In a conference between himself and three of his brothers, including the defendant, in the evening of Christmas Day, 1909, Charles Harder told them of the misconduct of his wife with Hardenberg and of his fear of his life at their hands, and stated to them that the money in question was his own, that he did not want his wife to have any of it in case of his death and that he gave to them and another brother not then present the money. He took the draft from his pocket and handed it to one of the brothers, not the defendant, who examined it and passed it to the third brother. The latter offered to return it to Charles Harder, but the latter refused it and told him to return it to the defendant, to be held for the four brothers.

The next evening Charles and the defendant visited the fourth brother, where Charles repeated in substance the same statement about his wife and the gift of the money to the quartette of brothers. The four brothers give a very circumstantial account of this transaction. They state that Charles Harder never afterwards claimed or asserted any act of ownership or control over the money, and that the certificate of deposit remained in the possession of the defendant until maturity, when it was cashed and later on the proceeds were divided equally among the four brothers, long prior to the commencement of this suit.

It appears in testimony that the plaintiff married Hardenberg, later divorced him and married a man named Richardson, who was killed by Hardenberg, and that after the commencement of this suit she married Bosma, by which name she prosecutes the litigation.

1. In reality, the only substantial dispute on the facts is whether or not the money was indeed community property within the meaning of the laws of Idaho. The fund was accumulated in the State of Oregon and was in the possession of Charles Harder. He exercised acts of ownership over it by taking it to Caldwell and depositing it there in the bank in his own name. He further exercised authority over it as owner by withdrawing it from the bank and taking it to Portland and afterwards placing it in the possession of his brother. It is presumed, among other things, "that things in the possession of a person are owned by him; * * that a person is owner of property by exercising acts of ownership over it or by common reputation of his ownership," and "that private transactions have been fair and regular": Section 799, subds. 11, 12, 19, L. O. L.

2. When he transferred the money in its then shape of the certificate of deposit in the Idaho bank, the decedent declared that it was his own money, and this declaration was admissible in evidence under the authority of *Bartel v. Lope*, 6 Or. 321, and *Noblitt v. Durbin*, 41 Or. 555 (69 Pac. 685). *Prima facie*, then, the money belonged to and was the property of Charles Harder. It is true, the plaintiff says that the money was accumulated during the time they lived together as husband and wife and that, among other things, she cooked for harvest hands. This, however, does not establish her ownership in any part of the fund. The whole theory of the Oregon system of jurisprudence

is adverse to community property. It is entirely in favor of the separate property of husband and wife. In property matters they stand utterly apart except as to the *post-mortem* estates of dower and curtesy and such personal property interests as arise through the statutes of distribution and descents.

“When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property, except as provided in this act”: Section 7034, L. O. L.

“The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired, shall not be subject to the debts or contracts of her husband and she may manage, sell, convey or devise the same by will, to the same extent and in the same manner that her husband can property belonging to him”: Section 7044, L. O. L.

“The property, either real or personal, acquired by any married woman during coverture by her own labor, shall not be liable for the debts, contracts or liabilities of her husband, but shall in all respects be subject to the same exemptions and liabilities as property owned at the time of her marriage or afterwards acquired by gift, devise or inheritance”: Section 7045, L. O. L.

“All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed. * * And for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has”: Section 7050, L. O. L.

“It is presumed that a person takes ordinary care of his own concerns”: Section 799, subd. 4, L. O. L.

3. Thus equipped with independent authority over her own earnings, we may safely presume that the plaintiff took ordinary care to reduce to possession what she had acquired by her own efforts as a separate contracting individual. From all the presumptions mentioned, and the circumstances disclosed by the evidence, we are impelled to the conclusion that the money which Charles Harder took to Idaho, and of which the fund in question was a part, was his separate property. Under such circumstances the law is that separate property acquired in a state where community property is unknown, does not become community property, but remains separate property, when transported into a community property state: *In re Nicoll's Estate*, 164 Cal. 368 (129 Pac. 278); *Meyers v. Albert*, 76 Wash. 218 (135 Pac. 1003); *Kraemer v. Kraemer*, 52 Cal. 302; *Douglas v. Douglas*, 22 Idaho, 336 (125 Pac. 796).

In a note on page 220 of the first American edition of Kerr on Fraud and Mistake, is found this language:

"There can be no doubt of the power of a husband to dispose absolutely of his property during his life independently of the concurrence, and exonerated from any claim of his wife, provided the transaction is not merely colorable and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition by the husband be *bona fide*, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her: *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Cameron v. Cameron*, 10 Smedes & Mar. (Miss.) 394 (48 Am. Dec. 759); *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *Stewart v. Stewart*, 5 Conn. 317; *Holmes v. Holmes*, 3 Paige (N. Y.), 363."

This excerpt is quoted with approval in *Small v. Small*, 56 Kan. 1 (42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243). The same doctrine is recognized in

Leonard v. Leonard, 181 Mass. 458 (63 N. E. 1068, 92 Am. St. Rep. 426), cited in the plaintiff's brief. The teaching of that case is that actual transfers of both realty and personalty by the husband are to be upheld as against his widow, but not when they are merely colorable. The same distinction is observed in *Walker v. Walker*, 66 N. H. 390 (31 Atl. 14, 49 Am. St. Rep. 616, 27 L. R. A. 799), where it is held, in the words of the syllabus, that:

"A husband has power to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all *post-mortem* claims thereon by his widow."

But that:

"A transfer of personal property, which is a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share of his estate, is fraudulent and void as to her."

Neither is the case like that of *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650, 3 Am. St. Rep. 162). There, Weber's wife sued him for a divorce. He had transferred property to Rothchild for a greatly inadequate price, with the understanding that he should enjoy a benefit from it and be entitled to a reconveyance of the same on payment of a certain amount of money. This was held void as against the wife in her suit for divorce, because it was in fraud of her as a *quasi* creditor. Likewise, in *Barrett v. Barrett*, 5 Or. 411, it was held that the wife when suing for a divorce has a standing as such a creditor from the time the suit was begun, to inquire into the validity of a conveyance made by the husband at any time after the cause of suit arose. In that instance the husband, fearing the ad-

verse consequences of a suit which his wife had instituted against him, conveyed the property in question to his daughter, and it was held that the wife's standing as a litigant gave sanction to her inquiry into the validity of the transaction. In *Griffith v. Griffith*, 74 Or. 225 (145 Pac. 270), the husband on separation from his wife had bought some land with his own funds and directed the conveyance to be made to a brother, to be held by the latter for the benefit of the husband. He died during the pendency of the divorce suit, after which the wife, the suit having been abated, took out letters of administration and sued as such representative, as well as in her own name, to set aside the conveyance and subject the property to her control as administratrix in the settlement of his estate. There, the property actually belonged to the estate of the husband and it was proper that his personal representative should institute the suit for its recovery. The case did not depend upon the fraud on the marital rights of the wife.

In all these Oregon cases the husband was really the owner of the property in equity, while in the instant litigation the evidence shows without dispute that he parted with the title to the money beyond recall.

In *Jones v. Summerville*, 78 Miss. 269 (28 South. 940, 86 Am. St. Rep. 627), it was held that—

“Fraud on marital rights cannot be predicated of a voluntary conveyance by either husband or wife made to prevent the other from inheriting.”

In other words, if the property in question in very truth remains that of the donor or grantor and the transfer is made simply to cover it up for his benefit, and to conceal it from his wife as a claimant, it is really his and is subject to money demands his wife

lawfully may have upon it. On the other hand, it is an attribute of ownership of property that the owner may dispose of it as he will, and the transaction must stand because it is a lawful exercise of his authority over his own. It is analogous to the right of testamentary disposition of property and, if the title actually passes so that there remains no control over it on behalf of the donor or grantor, it is conclusive as against all other claimants.

4. The divorce proceedings mentioned may be laid out of the case, because it is in evidence that they were discontinued and the married pair had resumed matrimonial relations. The case then stands as if those relations had never been interrupted, and the transaction must be determined accordingly. If she had continued her proceedings to a successful conclusion entailing a money decree against her husband, and the money had remained in the custody of the defendant under the first arrangement, which was concededly for the benefit of Charles Harder and by which he did not intend to part with the property, the doctrine of the plaintiff's citations might have attached. But the evidence is clear, beyond dispute, that the defendant returned to Charles Harder on December 24, 1909, the certificate of deposit representing the entire fund with its accumulations. It was restored to its actual owner and placed in his custody. At that time Charles Harder and the plaintiff were living together as man and wife and the divorce proceedings had been discontinued. It was his property to do with as he chose, and there is no contradiction of the testimony of the four brothers that of his own accord, as a free gift to them, he made a present to them of his own money in the form of the certificate of deposit already mentioned.

Much is said in the brief about its having been done in secret. Great stress is laid upon the fact that after the death of Charles Harder and his burial at Milton, Oregon, the defendant preceded the plaintiff to Caldwell, where in company with the attorney who had been the confidential adviser of the deceased brother, he went to the bank and procured an examination of the papers in the decedent's private box, with a view, he says, of ascertaining whether there was a will. Complaint is made that the plaintiff had no notice of this search, but the testimony of the bank officers is clear on the point that no paper was abstracted from the box and that the defendant did not even have them in his hands, so that no effect adverse to the defendant can be given to this incident. Charles Harder had the right to dispose of his own property as he chose. It matters not whether it was done upon the housetop or in the closet. He had a right to do what he did and the gift was valid as against the plaintiff, although it diminished the amount of her subsequent inheritance.

5. Moreover, the law of Idaho, admitted in evidence, among other things declares thus:

"The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has in his separate estate; but such power or disposition does not extend to the homestead or that part of the common property occupied or used by the husband and wife as a residence."

This statute seems to have been borrowed from the State of California. It was there construed in *Spreckels v. Spreckels*, 172 Cal. 775 (158 Pac. 537), to mean:

"That during the marriage the husband was the sole and exclusive owner of all of the community property, and that the wife had no title thereto, nor interest or

estate therein, other than a mere expectancy as heir, if she survived him": Citing *Van Maren v. Johnson*, 15 Cal. 311; *Greiner v. Greiner*, 58 Cal. 119; *People v. Swalm*, 80 Cal. 49 (22 Pac. 67, 13 Am. St. Rep. 96); *Tolman v. Smith*, 85 Cal. 263 (24 Pac. 743); *Corker v. Corker*, 95 Cal. 309 (30 Pac. 541); *Fallbrook I. D. v. Abila*, 106 Cal. 362 (39 Pac. 794); *Estate of Burdick*, 112 Cal. 393 (44 Pac. 734); *Spreckels v. Spreckels*, 116 Cal. 343 (48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497); *Sharp v. Loupe*, 120 Cal. 93 (52 Pac. 134, 586); *Cunha v. Hughes*, 122 Cal. 112 (54 Pac. 535, 68 Am. St. Rep. 27); *Peiser v. Griffin*, 125 Cal. 12 (57 Pac. 690); *Estate of Merchant*, 143 Cal. 539 (77 Pac. 475).

It follows that whether we consider the money as the separate property of Charles Harder, which the evidence seems to have established, or whether it is to be treated as community property, according to the contention of the plaintiff, the result is the same, that the gift of it by Charles Harder to his brothers, absolute and unrestricted as it was, carried to them the title in the same to the exclusion of the plaintiff. It is unnecessary to consider the matter pleaded in abatement by the defendant. The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued October 16, modified December 2, 1919.

OREGON ENGINEERING CO v. WEST LINN.

(185 Pac. 750.)

Appeal and Error—Determination of Failure of Evidence to Call for Nonsuit.

1. On appeal in action at law, tried by agreement without a jury, the Supreme Court, in reviewing the trial court's denial of defendant's motion for nonsuit, can only inquire whether there is a total failure of evidence on any material issue.

Appeal and Error—No Review of Finding on Conflicting Evidence.

2. Where there is plenty of evidence to support it, a finding of the trial court, though on conflicting evidence, is conclusive on appeal.

Municipal Corporations—Recovery Despite Deviations not Authorized in Writing by Engineer.

3. In an action against a city to recover the price for constructing a reservoir and water system, in view of the contract, making the city's engineer the referee to determine the amount, quality, and fitness of work, and evidence showing that deviations from the contract by the contractor were at the instance of the engineer, held, that evidence supports court's finding for plaintiff contractor, despite deviations from the contract not authorized in writing by the engineer as required.

Municipal Corporations—Recovery for Construction of Improvement Despite Defects of Plan.

4. Where the work of a contractor to build a reservoir and waterworks system for a city was well done and in substantial compliance with its contract, and any unsatisfactoriness in the result was from a defective design, selected by the water commission, rather than from any fault of the contractor, the contractor can recover a retained portion of the price of the work, accepted by the water commission on recommendation of its engineer as required by the contract.

Pleading—Denial of Answer by Reply as Creating Issue.

5. A demand of the answer, denied by the reply, is one of the issues for determination, though the prayer of the answer did not ask for affirmative relief on such account.

Pleading—Item of Answer as Defense.

6. An item pleaded by the answer in reduction of any judgment recovered by plaintiff was pro tanto a defense.

Municipal Corporations—Payments on Improvement Contract—Right to Credit for Interest on Advancements.

7. Where the contractor to build a city's water system and reservoir received its compensation in municipal bonds in advance, the city, when sued to recover a deficiency in payments, is entitled to a credit on any recovery for interest accruing on the bonds during the time for which they were paid in advance as money advanced to the contractor for the purchase of materials.

Appeal and Error—Modification of Judgment to Give Credit.

8. Under Constitution, Article VII, Section 3, as amended in 1910 (see Laws 1911, p. 7), the judgment of the trial court for plaintiff will be modified by deducting therefrom an amount to which defendant is entitled as a credit for interest on advancements.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

This is an action to recover money. The plaintiff, on July 27, 1915, entered into a contract with the defendant city, whereby it agreed to construct a water system for such defendant. The complaint alleges that the erection of the reservoir and standpipe was sublet to the Standifer-Clarkson Co., a corporation, and that thereafter, the plaintiff and the subcontractor fully performed the terms of the contract except as modified in minor particulars under the direction of and upon the order of the city engineer, doing work and furnishing materials thereunder, to the amount of \$58,671.19, and through the subcontractor, performed extra work and furnished extra materials, under the direction of the city engineer, in the manner provided in the contract, amounting to \$3,435, making the total sum earned \$62,106.19. It is alleged that of this sum all has been paid except \$1,234.23, for which judgment is prayed. It further averred that on January 8, 1916, in accordance with the terms of the contract, the city engineer submitted his final and complete estimate of the work performed and materials furnished under the contract, which fixed the sum due as above set out. That on April 12, 1916, the city engineer, in accordance with the terms of the contract, delivered to the defendant city's water commission, a certificate showing that more than thirty days had elapsed since the completion of the water system and that no uncompleted or defective work has been discovered for which said water commission makes claim; that on December 27, 1915, the water commission, at a regularly called and conducted meeting, adopted a resolution accepting the work after thirty days from date; payment to be made if no liens were filed, with the exception that

\$1,500 be held back to secure the completion of certain details which could not be finished in winter weather. It then alleged that all such work has been done and accepted; that no liens or claims have been filed, that prior to the acceptance by the city engineer, and ever since, the water system has been in constant use by the defendant city, but that it wrongfully, arbitrarily and without cause, refused to accept and pay for the construction thereof; that the water commission, unreasonably, and without cause, refuse to file with the city recorder a statement, as provided in the contract, declaring the work completed; that plaintiff has fully performed, with approval of the engineer, etc. These allegations are followed by a prayer for judgment in the sum of \$1,234.23, with interest and costs. The answer, after admitting the execution of the contract, denies certain of the allegations of the complaint as to the completion of the work, as to its acceptance by the commission, and as to any right of recovery by plaintiff, and then pleads affirmatively that S. A. Cobb was not the city engineer, and had no authority to order any deviation from the plans, such power being vested in H. A. Rands, who is alleged to have been defendant's authorized engineer. It is then explained that defendant's alleged acceptance of the work was in the following language:

"On motion the work of the Oregon Engineering and Construction Co., putting in the water system for the city was accepted. After thirty days from date payment to be made if no liens or claims are on the same, with the exception that \$1,500 be held back for the completion of some details that cannot be done in winter weather; \$750 of said \$1,500 to be applied to the reservoir and a like amount to the pipe line. This acceptance is to be strictly in accordance with the con-

tract between said company and the commission, and in no way shall it be construed to vary the contract."

This acceptance is dated December 27, 1915. It is then asserted that the work was never completed, and that on February 8, 1916, and upon the request of plaintiff, by its president, the said order of acceptance was revoked. It is further alleged that owing to faulty construction and disregard of specifications, the pipe-line, and standpipe and the reservoir have developed leaks to such an extent as to cause a daily waste of more than 100,000 gallons. These averments are followed by some allegations regarding a claim of defendant against plaintiff for interest, but the prayer of the answer is for the dismissal of the action, with a judgment for costs. A reply was filed, joining issue upon the affirmative answer, and a trial was had by the court, without a jury, and thereafter the court filed its findings of fact and conclusions of law and entered a judgment for plaintiff in accordance with the prayer of the complaint and defendant appeals.

MODIFIED.

For appellant there was a brief over the names of *Mr. L. L. Stipp*, *Mr. L. L. Porter* and *Mr. J. F. Clark*, with an oral argument by *Mr. Stipp*.

For respondent there was a brief over the names of *Mr. J. Dean Butler*, *Mr. J. G. Arnold* and *Mr. Henry Bauer*, with an oral argument by *Mr. Butler*.

BENSON, J.—The assignments of error challenge the ruling of the court in denying defendant's motion for a nonsuit, and further urge that certain of the findings of fact are erroneous.

1. Since this is an action at law and the case, by agreement of the parties, was tried by the court without a jury, it is beyond the power of this court to do more than determine whether or not there is a total failure of evidence upon any material issue. In other words, was it error to deny the motion for a nonsuit? The assignments present no other question. In order to make clear the position of the defendant City of West Linn, which is the only appellant, we must observe certain provisions of the contract, which are as follows:

"No deviation from the plans and specifications will be allowed except by written permission of the Commission's Engineer.

"On or about the 20th day of each month during the progress of the work, included in this contract the contractor will be paid 80 per cent. of the contract price of the estimated amount of said work returned by the engineer as having been done during the preceding calendar month; and the balance of said contract price, being 20 per cent. thereof, shall be retained for a period of thirty days after the completion of the contract, to secure the payment of laborers who shall have performed work thereon, and materialmen who shall have furnished materials thereof, for any valid claims for fees or royalties for any patented invention, article or arrangement connected with the work, as security for the replacement or completion of any defective or uncompleted work which may be found; * *

"The work included in this contract shall not be deemed completed until the Water Commission shall have filed with the City Recorder a statement signed by a majority of them; but neither said statement, nor any acceptance of said work by said Commission, shall prevent said City from thereafter making any claim for uncompleted or defective work when the same is discovered.

"No payment shall be made, in any event from the said 20 per cent. so reserved until said party of the

second part shall have filed with the Commission a certificate, signed by the engineer, stating that said period of thirty days has elapsed, and that no uncompleted or defective work has been discovered for which the Water Commission makes claim.

"It is to be distinctly understood the measurements and estimates of the Engineer are to be taken as final and conclusive evidence of the amount of work performed by the contractor, and shall be taken as the full measure of compensation to be received by the contractor. The estimate is to be based upon the schedule of price for the labor performed and material furnished under the contract and in accordance with the annexed specifications, and whenever there may be any ambiguity therein, the Engineer's instructions shall be considered explanatory and shall be of binding force.

"In order to prevent disputes and litigation, the Engineer shall in all cases be the referee to determine the amount, quality, and acceptability and fitness of the several kinds of work and material which are to be paid for under these specifications, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of the contractor, and his decisions and determinations shall be final and conclusive."

2. It is urged by the defendant that S. A. Cobb, who was treated with by the contractor, as the commission's engineer, was not, in fact, such official, and therefore had no authority to deviate from the plans and specifications, or to make certificate of the completion of the work, or otherwise bind the commission. For this reason, among others, defendant argues that there is a failure of proof upon material issues. The testimony upon this point is conflicting, but there is plenty of evidence to support the finding of the trial court that Cobb was the commission's engineer, and therefore, such finding is conclusive.

3. The sufficiency of the findings is assailed further, upon the additional grounds (1) that there were deviations from the specifications which were not authorized in writing by the engineer; (2) that no certificate of completion of the work, as required by the terms of the contract, has ever been filed; (3) that the commission was justified in withholding its written declaration that the work has been fully performed. Considering these items in their order, we note that the deviations complained of were two in number. It appears that in the construction of the reservoir and the standpipe, there were two groups of expansion joints which were to be calked to prevent leakage. The specifications required that the joints in one group should be filled with asphalt of a certain grade. Cobb, the engineer, testifies that after a few of the joints had been so filled, he discovered that the result was not satisfactory, and he ordered the contractor to fill the remainder of such joints partially with loose sand, and pour in asphalt enough to complete the job. He did not give this order in writing, but the contractor obeyed. The other group of joints were to be lined with tin, and the space filled with asphalt. As to these, the engineer decided that a calking with oakum would be more effective, and he gave the contractor an oral order to that effect, which was likewise obeyed. It is not contended that the contractor profited in any way by these changes, or that there was any willful disregard of the specifications. It is argued that there developed an excessive leakage from both reservoir and standpipe, and that therefore the deviations were not trifling ones, but of sufficient gravity to constitute a serious breach of the contract. However, the evidence is widely divergent upon this point, and the trial court's finding is to the effect that the deviations did

not detract from a substantial performance of the contract. The trial court not only had before it the testimony of the engineer as to the necessity of the changes, but also this clause in the contract:

"In order to prevent disputes and litigation, the engineer shall in all cases be the referee to determine the amount, quality and acceptability and fitness of the several kinds of work and material which are to be paid under these specifications, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of the contractor, and his decisions and determination shall be final and conclusive."

Under these circumstances we cannot interfere with the finding of the lower court.

4. Regarding the contention that no certificate by the engineer of final completion has been filed, we find, from the transcript of the testimony, that on December 21, 1915, Cobb wrote to the commission the following letter:

"West Linn Water Commission,

"West Linn, Oregon.

"Gentlemen:

"You are hereby notified that the Oregon Engineering and Construction Company has completed their contract, except some minor details, which on account of the weather, it will be better to leave go until next spring or summer. To enable the commission to complete this work I would recommend that the sum of Five Hundred (500.00) Dollars be withheld in the final settlement. Said money to be withheld as follows: Two Hundred and Fifty (250) Dollars for completion and cleaning up reservoir and stand-pipe grounds. Two Hundred and Fifty (250.00) Dollars for cleaning and rolling ditches. In accordance with the foregoing I would recommend that a notice be filed with the city recorder, stating that they have completed the contract.

"Yours truly,

"S. A. COBB."

On December 27, 1915, the water commission held a meeting, the minutes of which disclose the following:

"On motion the work of the Oregon Engineering and Construction Co. putting in the water system for the city was accepted. After thirty days from date payment to be made if no liens or claims are on the same, with the exception that \$1500 be held back for the completion of some details that cannot be done in winter weather; \$750 of said \$1500 to be applied to the reservoir and a like amount to the pipe-line. This acceptance is to be strictly in accordance with the contract between said company and the commission, and in no way shall be construed to vary the contract."

On the following day the engineer sent to the plaintiff this letter:

"December 28, 1915.

"Oregon Engineering & Construction Co.,

"Oregon City, Oregon.

"Gentlemen:

"You are advised that at the meeting of West Linn Water Commission, held last night, the water work system constructed by you for the city of West Linn was accepted. Said acceptance was conditioned upon the retaining of Fifteen Hundred (1500.00) Dollars, one-half of which was for cleaning up and finishing reservoir and stand pipe, the other half for cleaning up ditches and other incidental work.

"Yours truly,

"S. A. COBB."

Cobb testified that early in the spring of 1916, the incidental work referred to in the documents above quoted was all completed by plaintiff, and thereafter Cobb addressed a letter to the commission which reads thus:

"April 12, 1916.

"West Linn Water Commission,

"West Linn, Oregon.

"Gentlemen:

"The contractors, the Oregon Engineering and Construction Company of Oregon City, Oregon, have com-

pleted their contract for the construction of a water system for the City of West Linn, in so far as I am concerned.

“Yours truly,

“S. A. COBB,

“Engineer of the West Linn Water Commission.”

The minutes of the commission show that on February 8, 1916, a meeting was held and this record was made:

“Minutes of the meeting of December 27th, 1916, and January 8th and January the 20th, 1916 read and approved, except that part of the minutes of December 27th, 1915, referring to the acceptance of the water system from the contractor, The Oregon Engineering & Construction Company, which is disapproved and any action taken at said meeting on said acceptance is rescinded.”

The city began using the system for the distribution of water to residents about the middle of December, 1915, and has used it continuously ever since. This action was not begun until late in 1917, and no objection to the form of engineer's certificate appears to have been made until after this action was begun. There is a sharp conflict in the evidence upon the question as to whether or not the president of the plaintiff corporation requested a rescission of the commission's acceptance of the work. There is considerable testimony to the effect that the work of the contractor was well done, and in substantial compliance with the terms of the contract and that if the result is not perfectly satisfactory, it is because the design selected by the commission is not the most desirable, rather through any default of the contractor. Under this condition of the record we cannot disturb the findings of the trial court and it follows that there was no error in denying the motion for a nonsuit.

5-8. Our attention is also directed to the fact that the answer pleads that by the terms of the supplemental contract, defendant is entitled to a credit upon any sum due to plaintiff, for interest upon money advanced to plaintiff for the purchase of materials, at a time when no payments were due from defendant to plaintiff, and that such interest amounts to \$160.14. The reply denies this demand, and it is therefore, one of the issues to be determined. Defendant asked for a finding thereon, but, through some inadvertence, the trial court failed to make one. The plaintiff urges that since the prayer of the answer does not ask for affirmative relief, there is no issue thereon. However, the answer very clearly pleads the item in reduction of any judgment which the plaintiff may recover, and is therefore, *pro tanto*, a defense. The evidence is all before us, and it appears therefrom that plaintiff received its compensation in municipal bonds, and while no *money* was advanced before it was due, plaintiff did receive its equivalent in bonds in advance, and defendant is entitled to the interest thereon. There is no dispute as to the amount of such interest if any be found to be due.

Under the authority of Article VII, Section 3, of the state Constitution, as amended in 1910, the judgment of the trial court will be modified by deducting therefrom \$160.14, and in all other respects it is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and BENNETT, JJ.,
concur.

Argued September 30, reversed and decree rendered December 2, 1919.

MERGES v. MERGES.*

(186 Pac. 36.)

Divorce—Review of Decree for Custody of Child.

1. Upon appeal from a decree relating to the custody of a child of divorced persons, the Supreme Court has appellate jurisdiction only.

Divorce—Affidavits Filed in Supreme Court not Considered.

2. Under Section 556, L. O. L., providing that appeals shall be decided upon the transcript and evidence accompanying it, affidavits filed in the Supreme Court upon appeal from a decree regarding the custody of a child of divorced parties cannot be considered.

Divorce—Child's Welfare Governs Custody.

3. Although Section 7057, L. O. L., provides that parents have equal rights to the custody of their children, yet, where there is a dispute between divorced parties, the controlling consideration is the child's welfare.

Divorce—Decree Awarding Custody of Child is Conclusive.

4. Under Section 756, L. O. L., defining the effect of decrees, etc., a modified decree granting a divorced husband the exclusive custody of his son is conclusive in absence of appeal, and can be superseded only by showing that conditions have changed.

[As as the power of a court to modify a decree as to the support of children, see note in 114 Am. St. Rep. 703.]

Divorce—Burden of Proof as to Custody of Child.

5. A divorced wife seeking to overturn a modified decree awarding custody of the child to its father has the burden of proof.

Divorce—Evidence as to Validity of Decree Awarding Child's Custody.

6. Evidence that a divorced wife consented to modification of a decree so as to award custody of the child to the husband in order to avoid the husband's formal application for such a modification, etc., held to show that she voluntarily consented to the modified decree despite her statement that she was tricked into giving her consent by representations that the change was merely formal.

Divorce—Effect of Evidence Regarding Custody of Child.

7. Evidence regarding a divorced father's affection and ability to care for his son held to show, contrary to the finding below, that the father should continue to have exclusive custody of the child with permission that the child visit his mother at certain stated periods.

*On the question of attachment of provisions as to custody of children in divorce decree, see note in L. R. A. 1917B, 495.

From Clackamas: JAMES U. CAMPBELL, Judge.

In Banc.

The origin of this litigation was a suit for divorce by Mary Edwards Merges against her husband, Ernest E. Merges, begun November 15, 1912. The present contention is about the custody of the minor son, Edward E. Merges, aged four years at the commencement of the litigation in 1912. The original decree provided that the plaintiff and the defendant should have custody of the child alternately, at times prescribed. Afterwards on February 3, 1913, the defendant moved the court for a modification of the decree respecting the control of the son so as to give it to the defendant exclusively, and the plaintiff at the time filed her consent to that modification. Accordingly, it was so done. On January 11, 1916, the plaintiff filed a motion so to change the next previous decree as to allow her to visit and see the child at reasonable and necessary times, and that the custody of him be equally divided between the plaintiff and the defendant, to each one half of the time. The court passed an order to be served upon the defendant requiring him to show cause why the motion should not be allowed. With it he filed a wealth of affidavits from upwards of fifty of the most eminent citizens of Portland, to the effect that the defendant was intensely devoted to the welfare of the child and gave him every attention that could be bestowed upon him in the way of care of his health and conduct; that the little fellow was greatly attached to his father and to the children living in his neighborhood and had thus far shown the effects of training in his exemplary conduct. The affidavits show that the affection manifested between the father and son is unusally warm and intense.

The parties filed their own affidavits and throughout their personal showing runs a vein of antagonism toward each other, which clouds the case.

Without any order having been made, the parties and their attorneys on May 23, 1916, stipulated that the matter of the custody of the child "shall be arranged to have the minor son of plaintiff and defendant visit the plaintiff, while he is in the City of Portland, after school hours during the afternoons of Tuesdays and Thursdays each week and during the daytime of Saturday of each week between the hours of 9 o'clock A. M. and 7 o'clock P. M. Arrangements concerning the visitation of said child during vacations and at other times shall be decided in case of the inability of plaintiff and defendant to agree, by an agreement between the attorneys for plaintiff and defendant." No action of the court was taken by virtue of this stipulation and on September 21, 1918, the plaintiff moved that:

"That part of said decree by which the defendant is granted the care and custody of the minor child of the plaintiff and the defendant herein, named Edward E. Merges, now of the age of about ten years, be set aside and that the care and custody of the said minor child, Edward E. Merges, be given to the plaintiff and that the plaintiff have the sole care and custody of the said minor child."

In addition to the affidavits, the court heard testimony of the parties and certain additional witnesses, and without making findings of fact gave an order of date June 12, 1919, in substance awarding the custody of the child to the plaintiff from and after June 14, 1919, the end of his school year, giving the defendant the right to have him with him one half of the time through the summer vacation, and during the remain-

ing portion of the year each alternate week during Saturday and Sunday, together with the right to visit him at all other reasonable times. The defendant appeals from this order.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. John H. Stevenson* and *Messrs. McCamant, Bronaugh & Thompson*, with an oral argument by *Mr. Wallace McCamant*.

For respondent there was a brief and an oral argument by *Mr. E. E. Heckbert*.

BURNETT, J.—During the progress of this litigation concerning the custody of the child, the plaintiff married another husband.

The testimony was heard and the case taken under advisement on February 11, 1919. The decree was rendered, as stated, June 12, 1919. Although the plaintiff had testified that she had no home and that on account of her husband's being in the army they could not have a permanent residence, the court recited that it appeared to its satisfaction "that the plaintiff has a home established in Portland, in the county of Multnomah, State of Oregon." As narrated in the brief of the plaintiff, some affidavits are filed in this court to the effect that after the hearing of the case below she established herself in a home at 535 East Nineteenth Street in Portland; that the defendant had separated from his wife, and that the nurse he had had in charge of the child had left his employment.

1, 2. As a preliminary to the consideration of the case, all the affidavits filed in this court and procured after the decree of the Circuit Court had been entered

must be laid out of the calculation. In such cases as this, the court has only an appellate jurisdiction and the statute, Section 556, L. O. L., plainly says that upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it. This is not a case where the parties have settled their dispute or one where the questions involved have become merely academic, but is one in which the controversy still persists and must be heard upon its merits. We cannot reopen the case and allow additional testimony to be taken upon either side for the first time in this court. It is true that in certain cases the court has heard and considered *ex parte* affidavits on motion to dismiss appeals. For instance, in *Ehrman v. Astoria Ry. Co.*, 26 Or. 377 (38 Pac. 306), the plaintiff had brought suit to foreclose a mechanic's lien. Having been defeated in the Circuit Court, he appealed, but afterwards, before the appeal was heard, instituted action on his claim and attached the property of the defendant. This state of affairs was made to appear by uncontradicted affidavits in this court and the appeal was dismissed on the ground that because he had begun an action at law and had attached property, the plaintiff had waived his pending appeal. In *State ex rel. v. Webster*, 58 Or. 376 (114 Pac. 932), the relator sued to have the defendant make a showing of the number of days he had been absent from the office of county judge on private business. Pending the appeal by the relator, the defendant resigned the office mentioned and the court dismissed the appeal on the ground that the question had become purely academic and did not present any real controversy. In many other cases the court has dismissed the appeal when the contention is shown without contradiction to have been

ended. Such instances are *Moore v. Moores*, 36 Or. 261 (59 Pac. 327); *Thomas v. Booth-Kelly Co.*, 52 Or. 534 (97 Pac. 1078, 132 Am. St. Rep. 713). The matter is thus aptly stated in *Livesley v. Johnson*, 48 Or. 40, 48 (84 Pac. 1044), where it was urged by the appellants that the parties had settled the dispute and canceled the contract upon which the suit was based, Mr. Chief Justice ROBERT S. BEAN speaking for the court:

"This is an appellate court, constituted and organized to revise and correct the proceedings of the trial court, when regularly brought before it by appeal, and has no original jurisdiction, except such as may be incidental to and in aid of its appellate powers. * * Its inquiry is ordinarily confined to an examination of the record of the court below as embodied in the transcript, but where the appellant has, by some act of his, subsequent to the rendition of the judgment or decree appealed from, waived the right of appeal or otherwise terminated the controversy, such fact may be shown by evidence *dehors* the record, and the appeal will be dismissed because there is no longer any substantial controversy between the parties. * * But, where the relief sought is based on newly discovered evidence, the remedy is not by motion in this court, but by an original suit to vacate or annul the decree. * * The facts upon which the motion in question is based are in the nature of newly discovered evidence, and the inquiry presented involves the consideration and decision of controverted questions of fact. The plaintiffs deny that any settlement of the subject matter of the litigation was ever made by them with Johnson. This question cannot be tried out on *ex parte* affidavits in this court, and the defendant's remedy, if any, must be found in some other proper proceeding."

So here, if any change in the affairs of the parties here involved has occurred since the hearing in the

court below, which would authorize an alteration in the custody of the child, it must be made the subject of litigation in the court of original jurisdiction. We are without power to consider such a showing.

3. The defendant contends that the father has the preference in the custody of the children, and cites *Jackson v. Jackson*, 8 Or. 402, in support of this theory. That case was decided before the enactment of Section 7057, L. O. L., which statute declares that:

“Henceforth the rights and responsibilities of the parents, in the absence of misconduct, shall be equal, and the mother shall be as fully entitled to the custody and control of the children and their earnings as the father.”

Primarily, therefore, under our statute, the parents have equal rights to the custody of their children. Where this is in dispute it is universally conceded that the controlling consideration, paramount above all others, is the welfare of the child. It is not a chattel like pigs, chickens or furniture, to be divided between the divorce litigants on the basis of monetary value; neither is its custody to be made the vehicle for a continuation of their antagonisms and resentments toward each other. It is a matter of almost tragic regret that parents should break up their home by their bickerings and deprive their child of that nurture and admonition that congenial parents can give. But such things happen, and out of the wreck the courts must do the best possible under the circumstances for the welfare of the offspring. The preferences of the parents, whether founded in spite or in real affection, must yield to the best interests of the child. The authorities are practically unanimous on this subject. The principle is conceded in the

argument and it is not necessary to note precedents in support of this conclusion.

4. The court rendered a decree respecting the condition and custody of the child. The defendant cites many precedents to the effect that this decree, like all others of a court having competent jurisdiction of the persons and of the subject matter, is final and that it cannot be overturned or modified unless subsequent conditions justify such a change. To this effect, see *Crockett v. Crockett*, 132 Iowa, 388 (106 N. W. 944), where the court, speaking by Mr. Justice BISHOP, says:

"It is fundamental doctrine that a matter, including all phases which are or should have been brought to the consideration of the court, which has been once litigated and passed into judgment or decree, must be considered as settled beyond recall. The rule and the reason for it spring readily to the mind of every lawyer. And the rule has application to divorce cases, and to matters collateral thereto, equally with all other cases, save that as authorized by the statute, and as dictated by that tender solicitude for the welfare of children by which the courts should ever be actuated, a change may be made, whenever adequate cause arising out of changed conditions shall be made to appear." (Citing many authorities.)

We need not go far afield to sustain this principle, for it is settled by Section 756, L. O. L., reading in part thus:

"The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge thereof of this state or of the United States, having jurisdiction to pronounce the same, is as follows:—

"1. In case of a judgment, decree or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political or legal condition or relation of a particular person, the judg-

ment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person."

The order of February 3, 1913, therefore, granting the exclusive custody of the son to his father, the defendant, was final and conclusive in the absence of an appeal therefrom and can be changed or superseded only by a showing that for some reason the father is not competent to care for the child or that some condition has arisen rendering his further care and custody by the father inimical to the child's welfare.

5. The burden is upon the party, the plaintiff here, seeking to overturn the arrangement made by the order of February 3, 1913, for she is the moving party.

6. She contends in her affidavit that she was induced to consent to the modification embodied in that order by the representations of the defendant's attorney to the effect that the change was merely formal, for the purpose of giving the defendant a better showing in the way of balancing the fact that she had obtained the decree of divorce. She is contradicted in that matter by the circumstantial affidavits of the then attorney of the defendant. These affidavits are to the effect that after the divorce had been granted, the defendant went on a business trip to California; that on his return he obtained certain documentary and other evidence which he claimed reflected adversely upon the character of the plaintiff and tended greatly to show her lack of qualification for the care and custody of the child, which evidence was shown to her attorney, who in turn consulted his client, the plaintiff, about it and notified her of the proposal of the defendant to make it a ground for his application to the court for the modification unless she would con-

sent to such change in the decree; that after consulting with her attorney on the subject, she did consent, as already stated, signing the agreement not only herself but by her attorney also, and the modification was accordingly made, as stated. It is not necessary here to inquire whether the defendant's showing mentioned in the attorney's affidavits was true or false. It is not before us and we are not called upon to investigate it. The affidavit which merely alludes to the general nature of the defendant's claim is considered in rebuttal of the plaintiff's contention that she was tricked into giving her consent to the decree she now seeks to have modified. Her then attorney is not produced to contradict this statement and the weight of the testimony moves us to say that the decree of February 3, 1913, was entered with her consent and is valid. Moreover, she makes no formal attack upon the decree except by her innuendoes in her affidavit. She did not appeal from that decree. Consequently, we must hold it to be a valid exercise of the power of the court.

7. Concerning the actors in this domestic tragedy, the record shows that the parents were unable to agree in their affairs; that bitter quarrels were prevalent between them and that the defendant had prepared to sue for divorce and the custody of the child. In pursuance of some negotiations he declined to file the complaint, but he and the present plaintiff went together from Portland to Oregon City in his automobile, where the summons and complaint were served upon the defendant, as they sat together in the car in front of the courthouse. The plaintiff's present husband also instituted a suit against his then wife for divorce. The latter defendant not only resisted the divorce, but instituted an action against the plain-

tiff in this suit for alienation of her husband's affections. After the modification of the decree relating to the custody of the child, the present plaintiff absented herself from the state. For a time she lived at Vancouver, Washington, and would come to visit the boy on Sundays. She also lived in Seattle and when the child was taken ill with appendicitis and was in the hospital in Portland she went there and remained with him until he was convalescent. Likewise, she traveled in California, being absent from the state on that trip for about nine months. She contends that she was put off with excuses when she desired the child to visit her, so that his visits became less and less frequent. The defendant says that while she was at Vancouver and in that neighborhood she was never denied her requests to have the child visit her and he was sent to see her, not always on the particular date she demanded, but as soon as convenient thereafter. She complained that when she was allowed to visit the boy she was never permitted to see him alone, but always in the presence of some third person, and that when he came to Vancouver he was accompanied by some custodian, sometimes by his paternal grandfather and sometimes by his nurse. It turned out, however, that the nurse in question was her warm personal friend and she testified in substance that there was no one with whom she would rather have the child. It appears by the record that the defendant was married again and afterwards separated from his second wife. It is amply shown, however, by the testimony and by affidavits in the record, that through all these troubles the defendant had devoted himself to the care of the boy and his training, so that he has grown to be a very manly, lovable child. The great weight of the testimony also

is that the defendant has taught his son to respect and love his mother.

Both parties are amply able financially to provide for the welfare of the child. The defendant maintains a home in a very respectable neighborhood in Portland and is shown to be surrounded by excellent people. The boy's playmates mainly live in that neighborhood and his friends are there. Even the mother says:

"Mr. Merges is abnormally fond of the child. I have never at any time denied that he was abnormally fond of the child. In fact, it is almost a mania."

She says, too, that the child is afraid of his father. But she is utterly alone in this statement. No other witness or affiant says anything of the kind. The consensus of those who have spoken on that subject, except herself, is that father and son are extremely fond of each other and that the control of the father over the son is by means of affection and not force. To sum up on this point, it is plain that since the decree of February 3, 1913, no material change has occurred in the father's ability or inclination to care for the child in the best possible manner. If he was fit then to have the care of the child, he is fit now. The mother voluntarily relinquished the custody of the child. Her voluntary absence from the state and her marriage to her present husband do not detract from the finality of the former decree or depreciate the excellence of the defendant as a caretaker for his son. At least, they do not turn the scale in her favor or aid her in her effort to show that new conditions have arisen requiring a change of custody for the minor. To take him from the devoted care of his father, under whose tutelage he has been for seven years, with such excellent results in the child's con-

duct, and to put him in the home of a stepfather, under the circumstances of the case, would be to disrupt the foundations of his character, to the great hurt of the child. As already intimated, a vein of acrimony toward each other runs through the personal statements of the two parents. A divided custody of the boy would tend to intensify rather than to allay this, and he would be the innocent sufferer on account of it. He lived happily and with excellent results in charge of his father under the decree to which the mother advisedly gave her consent. It is best under the circumstances to let well enough alone until new conditions intervene to disturb the status established by that decree. The determination entered February 3, 1913, should not be disturbed, and so far as it has been affected by the one of June 12, 1919, the latter decree should be reversed and one entered giving to the defendant the exclusive custody of the child.

Thus far we have proceeded upon the consideration of the best welfare of the boy, relegating to a secondary place the preferences and caprices of the parents, whether they amount to mere captious and quarrelsome contentions or whether they are founded in sincere love for the child. The father ought not to be deprived of the society of the son upon whom he is lavishing such a wealth of affection. No matter what the conduct of the plaintiff may have been, we cannot attempt to quench the flame of maternal love which exists in every mother's heart, and she ought to be privileged to see the child and visit with him. Some reasonable concession ought to be made in that direction. As a working basis, therefore, upon which the parties shall act, a decree will be entered to the effect that the custody of the child shall be given to

his father, the defendant, with the proviso that the plaintiff may have the child with her to the exclusion of the defendant during the first half of the summer vacation of the Portland, Oregon, public schools, and during Saturday and Sunday of every alternate week of the remainder of the year, beginning with the Saturday next after the filing of the mandate of this court in the Circuit Court. The decree will be in such general terms, with the admonition to the parties that the law is, in such cases, that if new conditions arise rendering it desirable, in the judgment of the court, considering the best interests of the child, that a change should be made in his custody, the court is open on the application of either party to bring about such a change. The plaintiff and the defendant have been separated. They should lay down their rages, revenges and resentments, in the interest of the child. They should not make his care or custody the occasion for continued bickering. They ought to have more regard for his welfare than to cloud his life with constant quarreling. It is impracticable further to lay down specific hours or days when the mother shall see her son. Forced upon us as this dispute is by the contentious estrangement of the parents, we are obliged to devise a *modus vivendi*, whereas the parties in the exercise of common sense ought to settle it themselves by mutual concessions. If they have genuine regard for the welfare of their own child, they will act reasonably and not trouble the court with captious litigation. They should withdraw their own personalities from the contest and so conduct themselves as reasonable people that something may be saved from the wreck of their home, for the benefit of the boy.

The decree of the Circuit Court will be reversed and one entered in accordance with this opinion, with the further provision that neither party recover costs or disbursements from the other.

REVERSED. DECREE RENDERED.

Argued October 1, reversed and dismissed October 21, rehearing denied December 9, 1919.

FARMERS' NAT. BANK v. RENFRO.

(184 Pac. 564.)

Judgment—In Suit by Creditor to Subject Lands to Judgment, Defendant can Question Origin of Creditor's Claim.

1. Where a judgment was rendered in Oklahoma against defendant's husband and the judgment creditor then sued defendant and husband in Oregon, asserting that a conveyance by the husband to defendant was fraudulent, and seeking to subject to its claim Oregon lands acquired by defendant with the proceeds of the property conveyed to her, *held* that defendant might inquire into the origin of the claim of the judgment creditor.

[As to transfers between husband and wife, see notes in 19 Am. St. Rep. 657; 20 Am. St. Rep. 715; 90 Am. St. Rep. 497.]

Fraudulent Conveyances—Defendant Grantee must be Without Notice of Fraud, and have Paid Valuable Consideration.

2. Under Sections 7397, 7400, 7401, L. O. L., three things must concur to protect the title of a purchaser of property where the conveyance is attacked by creditor of the vendor as fraudulent: (1) He must buy without notice of bad intent on the part of vendor to defraud; (2) he must be a purchaser for valuable consideration; and (3) he must have paid the purchase money before he had the notice of fraud.

[As to the knowledge of vendee as affecting validity, see note in 34 Am. St. Rep. 395.]

Fraudulent Conveyances—Evidence Insufficient to Show Transaction Fraudulent.

3. In a suit by an Oklahoma corporation which had recovered in courts of that state a judgment against defendant's husband attacking as fraudulent a conveyance of property by the husband to her, and seeking to reach land acquired in Oregon by defendant with the proceeds of the property conveyed, etc., evidence *held* insufficient to show that the transaction was fraudulent, and open to attack, within Sections 7397, 7400, 7401, L. O. L.

Judgment—Foreign Judgment Entitled to Full Faith and Credit.

4. A judgment of the courts of one state is, as to matters adjudicated, entitled to full faith and credit in another state.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1.

The plaintiff, an Oklahoma corporation, having recovered judgment in a court of that state against C. R. Renfro, one of the defendants here, as for money had and received, brought an action against him in the Circuit Court of Lane County in this state upon said judgment and recovered an Oregon judgment for \$3,482 with interest, together with costs and disbursements. This suit by the bank is against Renfro, his wife, Margaret Renfro, and his brother, A. R. Renfro. In substance, the complaint charges that the husband Renfro, being indebted to the plaintiff in Oklahoma for more than \$3,000 for money had and received, conveyed to his wife certain realty in that state, with the intent and purpose on his part, known and participated in by the wife, to defraud the plaintiff as his creditor; that the wife afterwards sold the Oklahoma realty and invested the proceeds in other lands and certain merchandise in Lane County. A. R. Renfro, the brother, is made a party because he has a mortgage for \$4,000 given by the husband and wife upon the Lane County land, which the plaintiff alleges is fraudulent. Except as to the relationships of the defendants, the complaint is denied.

The defense principally relied upon is to the effect that prior to the commencement of the plaintiff's action in Oklahoma and while the husband and wife had no knowledge whatsoever of the claim on the part of the plaintiff against either of the defendants, the wife bought from the husband the Oklahoma realty

already mentioned, paying therefor a valuable consideration, and took conveyance from her husband, which was duly recorded prior to the commencement of the plaintiff's action, and that afterwards the wife paid off and extinguished the mortgage already upon the land when she bought it, sold the property and invested the proceeds in the Lane County lands and the merchandise mentioned, all in good faith, for a valuable consideration and without any knowledge or notice whatsoever of any claim on the part of the plaintiff. This new matter was traversed by the reply.

After the testimony was closed, the court reopened the case at the instance of the plaintiff, took additional testimony by deposition of witnesses in Oklahoma on behalf of the plaintiff and subsequently rendered a decree to the effect that the defendant husband is the owner of the Lane County land; that the wife holds title to it in fraud of the plaintiff and that the same should be subjected to an execution on plaintiff's Lane County judgment. The defendants appeal.

REVERSED AND DISMISSED.

For appellants there was a brief over the names of *Mr. Lark Bilyeu* and *Messrs. Potter & Immel*, with oral arguments by *Mr. Bilyeu* and *Mr. E. O. Potter*.

For respondent there was a brief over the names of *Mr. J. M. Devers*, *Mr. J. S. Medley* and *Mr. Charles A. Hardy*, with an oral argument by *Mr. Devers*.

BURNETT, J.—The chronology of the events involved in this litigation is substantially this: The plaintiff claims that it bought certain alleged state warrants which afterwards proved to be forgeries; that the defendant husband acted as an intermediary

between the officer of the state who uttered the forged paper, and the Guthrie National Bank, passing the invalid warrants from the officer to the bank for the account of the plaintiff. This transaction took place in the latter part of January, 1911. The husband suffered a stroke of paralysis on May 7, 1911, and became unable to attend to his business. The Oklahoma land in question did not constitute the whole of his possessions. He had other realty at the time and was engaged in a prosperous drug business at Guthrie, Oklahoma. It is claimed on the part of the defendants that the husband was greatly worried about the six thousand dollar mortgage on the land, and to relieve him the wife paid him out of her own funds about \$5,000, and took title from him by deed of February 19, 1912. There is evidence to the effect that a previous deed had been made in December before but was informal in some particulars, requiring the instrument already mentioned as a means of correction. The next event was the departure of the husband and wife to take up their residence in Oregon, in the latter part of February, 1912. Succeeding this, on March 8, 1912, the plaintiff began the action against the husband, the Guthrie National Bank and its cashier, to recover as for money had and received to the use of the plaintiff. Judgment was not rendered in that action until April 27, 1915, more than three years after its commencement. Action upon the Oklahoma judgment was begun in Lane County, Oregon, on November 13, 1915, resulting in a judgment against the husband on March 3, 1916, as already stated. Afterwards came the instant suit.

There is a dispute in the testimony between the husband and the cashier of the Guthrie bank, Sohlburg by name, about who took the initiative in bringing

about the transaction concerning the warrants. Renfro testifies in substance that he was approached by Sohlburg, inquiring for warrants, while the latter contends that Renfro took up the subject with him. This is not necessarily material in the inquiry. It seems from the testimony that banks in Oklahoma were anxious to buy state warrants as an investment because they were not taxable. There is no testimony whatever tending to show that Renfro knew that the warrants in question were forged, and he is uncontradicted in his statement that the first he knew of any claim against him on account of his connection with the transaction was when Sohlburg sent him a copy of the papers served in the Oklahoma action.

As to the origin of the funds which the wife claims to have paid to her husband for his interest in the Oklahoma lands, we have only the testimony of the husband and wife. She states that she married her husband in 1891 and that he was then a prosperous druggist at Guthrie and had plenty of money. They both agree that at the beginning of their married life he gave her regularly \$10 every month for her own use, independent of the expenses of the household. Soon afterwards he increased this to \$50 per month. They also say that she invested her money and reinvested it and was frugal in her habits, so that at the time of the conveyance she had accumulated in the neighborhood of \$5,000. He tells of giving her money at different times, among others, \$300, being half of a \$600 bet he won on an election. She narrates her purchase for \$450 of some lots she afterwards sold for \$2,100. They do not produce any books of account showing all these transactions, but there is nothing to contradict them in their positive statement.

1-4. The deposition of Sohlburg is to the effect that Renfro brought the bonds to the former's bank and that the check which the agent of the plaintiff gave in payment was carried to Renfro's account in the Guthrie bank. Renfro testifies substantially that he simply acted as messenger from the state official to the Guthrie National Bank; that in return for the warrants he received a cashier's check on that bank, whereupon he protested that it should not have been drawn in his name, as he was not selling them, but that Sohlburg put him off with the statement that the books had been made up, as the transaction had occurred after banking hours and that it would not make any difference, whereupon Renfro indorsed the check to the state official. The witnesses account for this being after banking hours by the fact that owing to the train schedule the officer could not arrive at Guthrie until evening. There is no testimony tending to show that Renfro knew that the warrants were invalid. Neither is there any evidence indicating that his wife knew of any claim of the plaintiff against him prior to the commencement of the action. It will be noted that all of the money which the wife had, in whatever manner she acquired it, was accumulated prior to the transaction concerning the warrants. The conveyance for which she paid was made before the commencement of the action and, so far as the testimony shows, was executed and delivered before the grantor therein had any notice of the plaintiff's claim against him. That the defendant's wife has a right to inquire into the origin and circumstances of the plaintiff's demand against her husband is taught in *Barnes v. Spencer*, 79 Or. 205 (153 Pac. 47). There, the defendant Spencer had acquired judgment against the husband of Mrs. Barnes in California, had sued

upon it in Oregon and recovered a domestic judgment here. He was attempting to levy an execution upon property which Mrs. Barnes claimed was purchased with her money by the husband, who took title in himself contrary to her instructions. The court there permitted her to inquire into the origin of the claim of the judgment creditor. This ruling depended upon the principle that she was not bound by any judgment to which she was not a party. So here, Mrs. Renfro is not concluded in this suit by the mere rendition of a judgment in any court unless she was a party to it. She is entitled to put in evidence all the circumstances attendant upon the origin of the claim, not only to show that her husband had no intent to defraud his creditors, having no knowledge of any such claim, but also that even if there were such a fraudulent design on his part she knew nothing of it and did not participate in the deceit. There is nothing against the claim of the husband and wife that she paid him a valuable consideration for the property in Oklahoma. To a financially interested critic there might be suspicion that she could not acquire \$5,000 during the twenty years of her married life. Mere suspicion, however, is not enough to overthrow a positive statement which is not unreasonable. It is further suggested that there were no books of account offered, nor any details given about the numerous transactions which would lead to the accumulation of that amount of money. We must remember, however, that it is not improbable that a husband engaged in prosperous business should give his wife money continually and systematically. Neither is it beyond belief that while they prospered and were harmonious in their domestic life business was not transacted between them with that same punctilious accuracy that

would characterize dealings between strangers, both of whom were business men.

The legislative department of the government has codified the rules relating to conveyances with intent to defraud creditors. They are here set down:

Section 7397, L. O. L. "Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void."

Section 7400, L. O. L. "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law."

Section 7401, L. O. L. "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The opinion in *Garnier v. Wheeler*, 40 Or. 198 (66 Pac. 812), written by Mr. Justice MOORE, is authority for this principle:

"Three things * * must concur to protect the title of the purchaser: (1) He must buy without notice of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase money before he had notice of the fraud."

And it is said by Mr. Justice BEAN in *Bond v. Ellison*, 80 Or. 634, 639 (157 Pac. 1103, 1104):

“In order to avoid a sale upon the ground of fraud, the vendee must have had notice of the vendor's fraudulent designs. Notice of the fraudulent intent of the vendor may be inferred from the circumstances; but the mere negligence or want of diligence in not inquiring into the facts known to him and calculated to put him upon inquiry is not sufficient to charge him with notice of fraud.”

See, also, *Coffey v. Scott*, 66 Or. 465 (135 Pac. 88).

The testimony shows without dispute that when the husband gave money to his wife he had a right to give it, making it hers as against all the world, because it was given to her long before the transaction concerning the warrants was had or thought of. They explain the transfer of the property on the ground that the husband had suffered a stroke of paralysis and his tenure upon life at that time seemed to be precarious; that he was worried by that fact and the further circumstance that there was a mortgage of \$6,000 upon the land; that to remove the worry and to dispose of the property so that she could handle it without being complicated with his estate in case of his death, the conveyance was made, and that all the while they were both entirely unaware of any claim on behalf of the plaintiff against the husband on any account. It is not improbable, much less impossible, that during her twenty years of married life, with a separate income of fifty dollars per month and her investments and reinvestments, the wife accumulated \$5,000. That she paid this to her husband is not disputed by any testimony. It constitutes the valuable consideration mentioned in Section 7401, L. O. L. It is utterly uncontroverted that she had no notice whatever of any fraudulent intent on the part of her hus-

band and the testimony is clear that the latter had no such intent, because he was not aware of any claim against him on behalf of the plaintiff. The case made by the defendants conforms to the standard of testimony announced in *Garnier v. Wheeler*, 40 Or. 198 (66 Pac. 812). Moreover, it appears without dispute in the testimony that the husband had upwards of five thousand dollars' worth of other property, part of it realty, in the state of Oklahoma, independent of the transferred land, even if the latter were a pure gift. The plaintiff may have lost money in its endeavor to acquire nontaxable securities as an investment, and we cannot disturb the judgment which it has against the defendant husband, for the determinations of the courts of a sister state are entitled to full faith and credit here. But the evidence does not disclose anything to contradict the position of the wife that she paid a valuable consideration for the property without notice of any fraudulent intent on the part of her husband. We think that the plaintiff's showing is not sufficient under the rules laid down by our Code on the subject to sweep away the wife's accumulations of twenty years, in the interest of the plaintiff.

The decree is reversed and the suit dismissed.

REVERSED AND DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued on behalf of appellants, submitted on briefs by respondent at Pendleton October 29, reversed December 9, 1919.

SHAW v. CORBETT.

(185 Pac. 585.)

Equity—Failure to Plead Doctrine of Clean Hands as Estoppel.

1. In a landlord's suit to remove a cloud upon title to land in the form of a lease, breached and abandoned by the tenant, a holding that plaintiffs did not come into equity with clean hands because of a showing that they had sold the land through defendant tenant as agent was improper, where no estoppel was pleaded.

Frauds, Statute of—Broker's Oral Agreement for Sale of Real Estate.

2. In a landlord's action to remove a lease as a cloud upon title, tenant's answer, claiming damages for alleged breach of real estate broker's oral agreement, although demurrable in view of Section 808, L. O. L., nevertheless, since the allegations of the answer were traversed, the defendant was put to proof, as under such section the oral contract was void, and evidence other than the writing or secondary evidence of its contents inadmissible.

Landlord and Tenant—Evidence of Tenant's Abandonment.

3. In a landlord's action to remove a lease as a cloud upon title, evidence held to indicate clearly an abandonment of the premises by the tenant.

Brokers—Landlord and Tenant—Abandonment of Lease—Equity from Void Agreement to Act as Broker.

4. Where defendant, tenant, abandoned the lease, plaintiffs, landlords, were restored to their own, independent of any relation of tenant, and no equity can arise from an oral agreement for the tenant to act for the sale of such property, void under Section 808, L. O. L., especially where defendant fails to show any assent or adoption by plaintiff of his acts in attempting to sell the land.

Landlord and Tenant—Nominal Damages for Breach of Lease on Shares.

5. Where landlords, suing for damages for tenant's failure to perform the terms of his lease on shares, have not furnished sufficient data in the testimony from which the court can estimate advisedly the amount of damages, they will be allowed only nominal damages.

[As to the rights and remedies of landlord on abandonment of premises by tenant, see note in 14 Ann. Cas. 1088.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

The plaintiffs leased to the defendant some real property with some livestock and farm machinery on

the premises, for the term of five years, for a share of the products of the leased property. They allege that he failed to comply with the terms of the lease, specifying particulars, and that he abandoned the same and the premises but having done so, continues to assert some right or claim by virtue thereof and refuses to cancel the lease. Claiming this to be a cloud upon their title obstructing the alienation or other disposition of the property on their part, they pray that the lease be canceled and that they have a decree against the defendant for damages which they claim have arisen by reason of his failure to perform the terms of the demise.

The lease is admitted by the answer. The defendant contends that he performed the terms thereof so far as he was able, but that on account of the sickness and death of his wife and his own subsequent illness he was compelled to be absent from the premises, although he employed servants to whom he committed the management of the leased property. He claims further that the plaintiffs ousted him from the premises and, still further, that in pursuance of an oral agreement entered into between the plaintiffs and the defendant about the time of the execution of the lease it was stipulated that the defendant should use his best endeavors to find a purchaser for the premises and property described in the lease for the sum of \$15,000, for which services the plaintiffs should pay him a 5 per cent commission, and that afterwards he found a purchaser for the sum of \$17,000, whereupon the plaintiffs refused to execute a conveyance of the property and afterwards contracted it to the same prospective purchaser for \$15,000. He claims damages on account of the alleged breach by

the plaintiffs of their contract. The answer is traversed by the reply.

The Circuit Court heard the testimony and entered a decree dismissing the suit and for costs. The plaintiffs appeal.

REVERSED.

For appellants there was a brief over the names of *Mr. O. B. Mount* and *Mr. E. R. Coulter*, with an oral argument by *Mr. Mount*.

For respondent there was a brief submitted by *Mr. Harrison McAdams* and *Mr. James H. Nichols*.

BURNETT, J.—1, 2. From the conclusions of law quoted in the abstract, the Circuit Court seems to have proceeded upon the theory that although the defendant had breached the terms of the lease, yet inasmuch as the plaintiffs had sold the property to a man whom the defendant claims to have induced to purchase the same, they had accepted the latter's services and could not be said to have come into equity with clean hands, and hence were not entitled to relief. The defendant does not plead any matter by way of estoppel. The answer was demurrable so far as the alleged employment of himself as a real estate broker is concerned, because it states that the agreement was oral: Section 808, L. O. L. Nevertheless, since the allegations of the answer were traversed, the defendant was put to his proof of the same. Under Section 808, L. O. L., declaring that an agreement authorizing or employing an agent to sell or purchase real estate for compensation or commission shall be void unless in writing expressing the consideration, signed by the party to be charged, the requisite evidence is found only in such a writing, because the statute expressly says that evidence of such an agree-

ment "shall not be received, other than the writing or secondary evidence of its contents, in the cases prescribed by law." The plaintiffs deny making such an agreement. On the merits, the great weight of the testimony indicates that they made no such agreement, oral or otherwise, and that whatever the defendant did in the matter was as a mere volunteer, most likely for the purpose of hindering the plaintiffs in the enjoyment of their property.

3. It would be an unnecessary encumbrance of the reports to go into an extended analysis of the testimony. It is sufficient to say that the case is plain that the defendant went upon the premises about April 26, 1918, about a week after the date of the lease, and was there but little of the time during the six weeks period thereafter, when he left the premises, taking away his personal belongings, and was never again on the place until he went there to subpoena a witness for the trial of this case. It is true that his wife was taken ill and finally died and that afterwards he himself was sick, but his conduct otherwise indicates a clear abandonment of the premises. The plaintiffs testify that he told them he could do nothing with the place and that they would have to do the best they could with it. An independent witness, apparently without interest in the controversy, declares that the defendant on a certain occasion said it was his last trip down to the place and that he would not have anything further to do with it. It was only after consulting the defendant and finding that he would have nothing more to do with the property, that the plaintiffs took active possession thereof and proceeded to dispose of it; and it was only on finding that they had an opportunity to sell the property that the defendant refused to execute a discharge of the

lease. It is without dispute that the plaintiffs refused to have anything to do with any arrangement for selling the property, in which the defendant was concerned. He cannot cloud the title or prejudice the plaintiffs in their acts of ownership over the property, by his own voluntary act under an alleged arrangement which the statute says is void, and which it declares shall not be the subject of any evidence.

4. As the defendant abandoned the lease, the plaintiffs were restored to their own, independent of any relationship with him, and no equity can arise from that which the statute says is void, especially where the defendant fails to show any assent or adoption by the plaintiffs of any of his acts in attempting to sell the property.

5. The plaintiffs are entitled to a decree canceling the lease as a cloud upon their title. They have not furnished sufficient data in the testimony from which the court can estimate advisedly any amount of damage. Confessedly, the defendant was unable to carry on the premises, having stated to the plaintiffs his inability to do so on account of being unable to borrow any more money. The men whom he found employed there when he entered into possession were engaged by him to continue in his service, but he could not pay them and they went to work for other parties, to the neglect of the property in question. One of them had gone permanently and the other was in the act of leaving when one of the plaintiffs came upon the premises.

Taking the case by its four corners as disclosed by the testimony, it presents an instance where an irresponsible tenant has utterly failed in his undertaking and has abandoned the property. He may have had his misfortunes, and be deserving of pity on that ac-

count, but the fact remains that he is unable to carry out his agreement, has given up the undertaking as hopeless, has abandoned the lease and has no further claim upon the property. The decree of the Circuit Court is reversed and one is here entered canceling the lease and allowing the plaintiffs the nominal damages of one dollar, the decree to be without costs or disbursements to either party.

REVERSED. DECREE RENDERED.

Argued October 16, reversed and suit dismissed December 9, 1919.

WILSON v. PRETTYMAN.

(185 Pac. 587.)

Logs and Logging—Evidence of Misrepresentation of Contents of Bill of Sale of Timber.

1. In suit to restrain defendant from cutting and removing standing timber from plaintiffs' lands under a bill of sale, evidence *held* insufficient to show any misrepresentation by defendant as to the contents of the instrument which she induced plaintiffs to sign.

Contracts—Seal as Presumptive Evidence of Consideration.

2. By Section 776, L. O. L., the seal on a bill of sale was primary evidence of consideration.

Logs and Logging—Evidence Showing Consideration for Sale of Timber.

3. In suit to restrain defendant from cutting and removing standing timber from plaintiff's lands under bill of sale, evidence *held* to sustain finding that the sole consideration moving from defendant for the transfer of the timber was her agreement to build a house and barn on her property adjoining plaintiffs' farm, thus increasing values in neighborhood.

Contracts—Pleading Failure of Consideration.

4. Total failure of consideration for an agreement, and the facts constituting such failure, must be pleaded, or evidence thereof cannot be considered.

Evidence—Parol Evidence Admissible on Issue of Consideration.

5. Testimony of conversations in regard to timber sold, had prior to execution of the bill of sale, may be considered only to determine the actual consideration for the transfer of the timber, and not to vary the terms of the written bill of sale.

From Multnomah: ROBERT TUCKER, Judge.

Department 1.

This is a suit which is brought to restrain the defendant from cutting and removing standing timber from the lands of plaintiff. The complaint avers that upon a tract of land described therein, there is a large body of trees and timber suitable for cordwood; that since September 1, 1917, defendant has wrongfully and unlawfully entered upon plaintiff's land and with employees has been cutting such timber into cordwood, and has thereby damaged plaintiff's estate to the extent of \$500. The prayer is for \$500, as damages, and for a restraining order against further trespass. Defendant filed an answer and cross-complaint, wherein after some admissions and denials, there is set up a written contract as follows:

"Portland, Ore., 8-23-16.

"Know All Men by These Presents, That we, Clarence True Wilson and Maud A. Wilson, of the County of Multnomah, State of Oregon, the parties of the first part, for and in consideration of the sum of \$1.00 to us in hand paid by E. E. Prettyman, of the County of Multnomah, State of Oregon, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, her executors, administrators and assigns, the following described property: All of the saw or merchantable timber for lumber now on my place or farm of 83 acres, more or less, located near Gresham, Oregon, with the exception of the cedar timber, which is to be divided as follows: One-fourth of the cedar timber to the party of the second part and three-fourths to the parties of the first part. Also we do hereby bargain, sell and convey to the party of the second part the first heifer calf born from Kate or Wilson's Pet, said calf to be one week

old and in good condition at the time it is turned over to the party of the second part.

"To have and to hold the same to the party of the second part, her executors, administrators and assigns forever. And we do ourselves, and for our heirs, executors, administrators and assigns covenant and agree to warrant and defend the sale of all the above property to the party of the second part, her executors, administrators and assigns against all and every person and persons whomsoever lawfully claiming or to claim same.

"In witness whereof, we have hereunto set our hands and seals this 23rd day of August, 1916.

"(Signed) CLARENCE TRUE WILSON. (Seal)

"(Signed) MAUDE A. WILSON. (Seal)

"Witnesses:

"HAZEL WHITCOMB."

It is alleged that the timber mentioned in this contract is the timber referred to in the complaint. It is further stated that plaintiff, without the consent or knowledge of defendant has cut about all of the cedar timber and appropriated it to his own use, and refuses to account to defendant therefor; that plaintiff refuses to permit defendant to cut or remove any of the timber so sold to her although she has frequently made demand therefor, and that she is informed and believes and therefore alleges that plaintiff and his wife have placed large mortgages on the property thus sold to the defendant and refuses to have the same released therefrom, or to allow the defendant to enter and remove the property so purchased. It is then alleged that defendant paid to plaintiff the sum of \$1,500, as the purchase price of such property, and the prayer asks for judgment in that amount.

Replying to the cross-complaint, plaintiff admits the execution of the contract as alleged, but avers that there was no consideration therefor, and explains the

transaction by alleging that prior to the execution of such contract, plaintiff and defendant had agreed to an exchange of real properties, wherein he was to receive a house and lot in Portland, in exchange for certain acreage which adjoined his farm; that defendant informed him that she intended to improve the tract of land so received from him, by erecting thereon a house and barn, and that she would like to get from the plaintiff a few trees from his farm, to have manufactured into lumber for such buildings; that thereupon plaintiff told her that she might have a few trees from his farm for that purpose, and that she might also have one fourth of the cedar timber on said farm for posts. It is then alleged:

“That based upon said conversation and agreement between the parties the defendant herein prepared the contract set out in her answer and cross-complaint, and the plaintiff signed the same, upon the statement and representation of the defendant that said contract was in accordance with this agreement as to such timber and said calf, without reading the same; that said contract as alleged does not state the agreement between the parties; that there was no consideration whatsoever for the execution thereof, and that the same was so drawn by the defendant for the sole purpose of cheating and defrauding the plaintiff herein.”

It is then alleged that plaintiff has cut the cedar timber, and has often notified defendant that she may go upon the premises and remove one fourth thereof upon payment of one fourth of the cost of cutting. This affirmative matter is denied by defendant in a reply. There are some allegations in the pleadings regarding the heifer calf mentioned in the contract, but as that element has been eliminated by the parties, it need not be considered. There was a trial and a decree which reads thus:

"It is therefore considered, ordered and adjudged, that the defendant herein may have one-fourth share of the cedar posts cut on the premises of plaintiff upon payment to plaintiff by defendant of the one-fourth cost of cutting the same; that defendant may have the eight or ten logs cut on said premises of plaintiff, but said cedar and said logs must be removed from the premises of the plaintiff by the defendant within thirty days from the date hereof and be so removed under the supervision of and upon notice to the plaintiff, and plaintiff have the injunction prayed for in the complaint and judgment against the defendant for his costs and disbursements herein taxed at the sum of \$ —."

From this decree defendant appeals.

REVERSED. SUIT DISMISSED.

For appellant there was a brief and an oral argument by *Mr. W. J. Makelim*.

For respondent there was a brief over the name of *Messrs. Wheelock & Williams*, with an oral argument by *Mr. A. E. Wheelock*.

BENSON, J.—1. The substantial issues in this case are to be found in the defendant's cross-complaint and the reply thereto. The defendant relies entirely upon the terms of the bill of sale for her right to enter upon plaintiff's lands to cut and remove the standing timber. Plaintiff's reply admits the execution of this contract by himself and wife, but alleges that it was signed by them, without reading it, relying upon defendant's representation that it was framed in accordance with their prior agreement, and that there was no consideration for its execution, and that the instrument was so framed by defendant for the purpose of cheating and defrauding the plaintiff.

The plaintiff and his wife both testify that the bill of sale was read to them by the defendant before its execution, and that they were also furnished with a carbon copy thereof. They also testify that when it was read to them, Mrs. Wilson said to her husband: "Are you going to sign that?" And when he assured her that he was, she reluctantly joined in its execution. Upon his cross-examination, Dr. Wilson testified as follows:

"Q. What did she say?

"A. She read it; she didn't say anything; she read it. All of the merchantable timber for lumber and Kate's calf. * *

"Q. That is all it said, isn't it?

"A. Yes, and Kate's heifer calf provided it is taken within seven days. Then on the strength of that I signed it.

"Q. That is all it said. What is the difference between what you have just related and what it says in the contract—

"A. The contract is all right and what I say is all right; they agree entirely."

We must therefore dismiss from our consideration any question of misrepresentation as to the contents of the instrument.

2. This brings us to consider the question as to whether or not there was a consideration. The contract itself recites a nominal consideration of one dollar. It is also to be noted that the agreement is a sealed instrument, and such seal is primary evidence of a consideration: Section 776, L. O. L. The testimony of the defendant is to the effect that the transfer of the property described in the writing was simply part of a larger transaction, wherein she exchanged a house and lot in the City of Portland for 40 acres of land adjoining plaintiff's farm, and the personal property which is the subject of this litigation. She also says,

that in the larger deal, she valued this personal property at about \$1,500. Upon the other hand, the plaintiff contends that the first conversation in which the transfer of the timber was mentioned occurred some weeks after every detail of the real estate transaction had been agreed upon, and at a time when that exchange was simply awaiting the preparation of the necessary conveyance. He says that it happened thus: That upon an occasion when the defendant was riding with him and his wife, in their automobile, Miss Prettyman asked him if there was any timber on her land, meaning the 40-acre tract which she had agreed to accept from him, in exchange for her house and lot in Portland. She said that she wished to build a house and barn thereon, to be occupied by her brother-in-law. Dr. Wilson replied:

"I don't think there is a tree, but I said, if you will do that, if you will build a house, I will give you all the timber that you can use in the building of your house and barn, and, 'I said, there isn't anything but punk up there, except eight or nine trees, maybe six or eight trees, I don't know.'"

Mrs. Wilson corroborates her husband in this, saying:

"And then, coming in, in the machine, that day, Miss Prettyman was asking about whether there was any—if there was any timber on her place. Dr. Wilson told her no, but we had a good many—several good trees on our place, and if she would build a house and barn that she was welcome to go and take all the saw and merchantable timber to build her house and barn with—she could take off our place. He says: 'You can take it all as far as I am concerned, but I am quite sure there are between eight and nine, maybe ten good trees that can be used for that purpose.'"

Upon cross-examination, Mrs. Wilson explains further:

"We were giving it to her so she would improve the neighborhood and thought it would increase the value of our place."

3, 4. Upon this evidence, the trial court made a finding to the effect that the sole consideration for the transfer of the timber agreement upon the part of the defendant was to build a house and barn upon her property adjoining plaintiff's farm, and this finding meets with our approval. However, the trial court went further, and held that since the defendant has not built any house and barn on the premises, there is a total failure of the consideration. We cannot agree with this conclusion for two reasons: First, there is no allegation in either of plaintiff's pleadings touching a failure of consideration, or that the house and barn have not been built, and no doctrine is better settled than that a total failure of consideration, and the facts constituting such failure must be pleaded, or evidence thereof cannot be considered: 13 C. J. 742, and cases there cited. Second, it is difficult to see how the defendant could be expected to erect the buildings from the timber described in the contract, before it has been severed from the soil and removed to the mill.

5. It must not be overlooked that we have considered testimony of conversations in regard to the timber, which were had prior to the execution of the bill of sale, for the sole purpose of determining the actual consideration for the transfer of the property, and not for the purpose of varying the terms of a written contract.

It appears from the evidence, that the seven trees already cut by the defendant are all merchantable timber suitable for lumber, and she is entitled to remove them. Whether or not there are additional trees of the same character upon the premises, we are unable

to say; but if there are, they belong to the defendant, and she has a right to cut and remove them, but is not entitled to any other kind. As regards the cedar timber, it appears that the plaintiff has cut practically all of it, and manufactured it into fence posts, one fourth of which belong to the defendant, upon payment by her of one fourth of the cost of such manufacture.

The possible failure of the defendant to perform her part of the contract, by building the house and barn upon her 40-acre tract, presents a question which can only be presented in some proper proceeding when such default has been properly established. It is not now before us.

A decree will be entered dismissing the suit without prejudice, neither party to recover costs in either court.

REVERSED. SUIT DISMISSED.

McBRIDE, C. J., and BURNETT and BENNETT, JJ., concur.

Argued October 10, modified December 9, 1919.

KIESENDAHL v. GANOE.

(185 Pac. 589.)

Trusts—Termination for Dereliction of Trustees.

1. Trustees holding apartment house property for a divorced husband and wife should have acted with promptness and efficiency in collecting and securing rents from the property, instead of letting it run constantly behind, into danger of being entirely exhausted and eaten up by expenses, and for failure to do so the trust was properly terminated at suit of husband and wife.

Trusts—Reimbursement of Trustees for Money Borrowed.

2. Where trustees of apartment house property for a divorced husband and wife acted in good faith in borrowing money to pay taxes and other expenses on the property, and to buy furniture left in the house by a tenant, and to buy a judgment against her under which the furniture might be levied upon, they should not lose the money

they put up for the benefit of the estate, and the *cestuis* cannot have reconveyance of the trust property until any amounts due on the notes have been paid or the trustees discharged in some way.

Trusts—Payment of Compensation to Trustees Before Reconveyance on Termination.

3. The amount due trustees for their services should be paid by the *cestuis* before reconveyance to them by the trustees on termination of the trust by court decree.

Trusts—No Continuance of Trust to Protect Unjeopardized Claims of Creditors.

4. When a trust is being constantly operated at a loss, and the property of the *cestuis* is ample to protect all the rights of creditors not made parties to the suit for termination of the trust, it should not be continued merely to secure the claims of such creditors.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

This is a suit brought by the plaintiffs, Emil Kiesendahl and Augusta Kiesendahl, against the defendants, Ganoe and Baker, to terminate a trust, and for an accounting and damages for the maladministration thereof.

It appears from the record that up to some time early in the year 1915 the plaintiffs, Augusta Kiesendahl and Emil Kiesendahl, were husband and wife. About that time, they being unable to continue the marriage relation, a divorce proceeding was brought, which finally terminated in a dissolution of the marriage bonds.

Plaintiffs then owned considerable property, more or less encumbered, consisting principally of an apartment house in the City of Portland, generally referred to as the "Mill Street property," and certain valuable residence property. There was a stipulation between the parties for a division of this property, and according to that stipulation Mrs. Kiesendahl got the residence property and a five-twelfth (5/12) interest in the Mill Street property, and Emil Kiesendahl got the

other seven-twelfth (7/12) interest in the latter property.

There was at that time a good deal of bitter feeling between the plaintiffs, and they being unable to agree as to the management of the property, it was arranged that it should be conveyed in trust to the defendants, Baker and Ganoe—Baker to hold the 5/12 interest of Mrs. Kiesendahl and Ganoe to hold the 7/12 interest of Mr. Kiesendahl.

These assignments provided, in brief, that the assignees should take the property and manage and control the same and collect the rents thereof, and out of the profits therefrom they should pay the debts and obligations of the Kiesendahls, including any debts due the trustees, and should pay over to the Kiesendahls a certain fixed sum each month, and turn the balance of the revenues after the debts and expenses were paid to the Kiesendahls, in proportion to their respective interests.

The property designated as the Mill Street property is more accurately described as follows:

“That portion of lots 7 and 8, block 189, city of Portland, bounded thus: Beginning on Mill Street in said city of Portland, at the northeast corner of said lot 8, block 189; thence southerly along the easterly ends of said lots 7 and 8, 95 feet; thence westerly parallel with the southerly side of said lot 7, 50 feet; thence northerly parallel with the easterly side of lots 7 and 8, 95 feet to the northerly line of said lot 8; thence easterly along the northerly line of said lot 8 to the place of beginning.”

At the time of the execution of the trust agreement and when the defendants took over the management of the property, it was rented to a Mrs. Jennie H. Stacy at a fixed rental of \$160 per month. The lease pro-

vided that it should not be transferred without the consent of the lessors in writing.

Mrs. Stacy paid the rent up to about the 1st of July of that year, and then undertook to transfer the lease to one Bradford, who, in his turn, undertook to transfer it to a Mrs. Hanson. Neither Mrs. Stacy or Bradford procured the written consent of the trustees to the transfer of the lease, as required therein. About this time rents seem to have gone down rapidly in the City of Portland and this property shared in the decreased rental value. Mrs. Stacy and her sublessees were clamoring for a decrease in rent, and claimed they were not able to pay the rent provided in their lease. Notwithstanding the failure to obtain the consent of the trustees to the transfer in writing, Mrs. Hanson went into possession of the property and held possession for about a year, without paying any rent to anyone.

The trustees refused to release Mrs. Stacy, and refused to accept any rent from her sublessees, claiming that they might, thereby, release her from her contract. They also refused, or at least failed, to make any reduction in the rent. They brought several actions against Mrs. Stacy to recover rent, in which they were successful in so far as recovering judgments were concerned. They seem, however, to have been unable to realize anything on execution, except on the first judgment, which was for \$320, which they recovered.

About May 31, 1916, Mrs. Stacy went into bankruptcy and was adjudged a bankrupt and the defendants received from the trustee in bankruptcy the sum of a little over \$100 upon the rent due from Mrs. Stacy. This, with the \$320 already referred to and the amount paid by Mrs. Stacy and Bradford for the first month or two, was all the sums ever received by the

defendants upon the rental of the property, until Emil Kiesendahl was put in charge of the same, as will be hereinafter stated.

After her liabilities to the trustees were finally fixed, by their having recovered the different judgments against her, Jennie Stacy commenced an action against Minnie Hanson, who was in possession of the property, to recover the rents from her. In this action the defendant Ganoe appeared for Minnie Hanson adversely to Mrs. Stacy, the tenant of the trustees.

Mrs. Stacy also brought an action of forcible entry and detainer against Minnie Hanson to recover possession of the property, and in that proceeding also the defendant Ganoe appeared for Mrs. Hanson. In the proceedings by Mrs. Stacy against Mrs. Hanson to recover rent there was a judgment in favor of Mrs. Stacy for \$985 and the plaintiff Emil Kiesendahl was placed in possession of the property by the sheriff in that proceeding. When Mrs. Stacy went into bankruptcy, the trustee in bankruptcy took charge of the property and paid rent for awhile to the trustees, but finally gave up the property and Emil Kiesendahl was then placed in charge by the trustees, defendants herein. About September 5th, he refused to turn over the proceeds of the house any longer to the defendants, and commenced to turn them over to H. E. Collier, one of the attorneys for the plaintiffs. At the time of the commencement of this proceeding the defendants, having failed to collect the greater portion of the rent for the entire time they had charge of the property, had not paid anything on the principal of the debt of the Kiesendahls, and in fact the property was constantly running behind. They had been compelled to borrow \$300 from the Northwestern Bank to pay the taxes and other charges, including interest on the mortgage, and

they had also at another time borrowed \$350 to buy the furniture left in the house by Mrs. Hanson, and to buy the judgment which Mrs. Stacy held against Mrs. Hanson, and under which the property seems to have been levied upon.

The defendants filed an account of the receipts and disbursements made by them, which is accepted, as we understand it, by the plaintiffs as substantially correct, and upon which the debits and credits are practically balanced.

In addition thereto, the defendant Baker claims that the plaintiff, Augusta Kiesendahl, is indebted to him in the sum of \$1,244.33, \$1,000 for services rendered during the continuancy of the trust and \$244.33 which he claims was due upon a stated account for services rendered previous to the initiation of the trust.

The defendant Ganoe also claims that the plaintiff Emil Kiesendahl is indebted to him in the sum of \$1,735, partly for services in the divorce proceedings prior to the creation of the trust, and partly for services performed as attorney during the pendency of the trust.

The decree of the court below was for a termination of the trust and for a reconveyance of the property by the trustees to the plaintiffs, according to their respective interests. The decree further provides:

“That the plaintiffs are entitled to credit from the defendants H. L. Ganoe and G. Evert Baker jointly and severally, the sum of \$550, lawful money of the United States, in lieu of rents which should have been but were not collected by said trustee defendants from the real property hereinabove described.

“That defendant G. Evert Baker have and recover of and from the plaintiff Augusta Kiesendahl the sum of \$335.83, and that after deducting 5/12th of said \$550, to wit, \$229.15, to be credited to plaintiff Augusta Kiesendahl, that the defendant G. Evert Baker have and

recover of and from said Augusta Kiesendahl after the deductions aforesaid, the sum of \$106.68. And that defendant H. L. Ganoe have judgment against the plaintiff Emil Kiesendahl in the sum of \$237.50 and that after deducting said \$237.50 from 7/12ths of \$550, to wit, \$320.81, that plaintiff Emil Kiesendahl have and recover his balance due from defendant H. L. Ganoe, the sum of \$83.31."

MODIFIED.

For appellants there was a brief over the names of *Messrs. Ganoe & Ganoe, Mr. G. Evert Baker, Mr. O. M. Hickey and Mr. L. G. English*, with oral arguments by *Mr. H. L. Ganoe and Mr. Baker*.

For respondents there was a brief with oral arguments by *Mr. H. E. Collier and Mr. John F. Logan*.

BENNETT, J.—The basis of the decree of the court below as to the respective allowances to the defendants for their professional services appears in an opinion filed by the court, which seems to have been accepted by both sides as findings in the cause, as no other findings appear in the record. We quote from these findings:

"Considering all of the circumstances and making due allowance for the time that the trustees might have reasonably considered that Mrs. Stacy was solvent and that the rent could be obtained from her, and providing amply for all reasonable delays and necessary reductions in rent, I am of the opinion that they lost on this account at least \$550, for which they should account in this suit. * * The fees that I consider were reasonable to be allowed for professional services are the following:

"1. In the first case against Mrs. Stacy for rent wherein \$388.11 was finally recovered, a fee of \$50 in the Circuit Court and \$25 for the dismissal of the appeal in the Supreme Court.

"2. The divorce suit of Kiesendahl v. Kiesendahl (Ganoe's portion), \$250.

"3. Rose Kiesendahl v. Emil Kiesendahl (replevin action) \$50.

"4. Feary Brothers v. Kiesendahl, \$20.

"5. Boyden v. Kiesendahl, \$20.

"6. Prettyman v. Kiesendahl, \$10.

"7. Burrill matter, \$5.

"8. Aplin Restaurant matter, \$10.

"9. Settlement of the Jorgens claim, \$25.

"10. Drawing two wills for E. Kiesendahl, \$30.

"11. Baker and Ganoe, Trustees, v. Stacy, action for \$480 filed December 15, 1915.

"No fees should be allowed, in my opinion, except the foregoing to either trustee, save such as have been heretofore referred to and approved."

The judge in the court below, heard the evidence in the cause and saw the manner of the witnesses upon the stand, and is in a better position to judge of the weight of their testimony than we can possibly be. We do not see any reason to disturb his findings upon these allowances.

1. We also agree with the court below that the defendants should have acted with more promptness and efficiency in collecting and securing the rents from the property. Under their management the property was running constantly behind, and it was only a question of time when it would have been entirely exhausted and eaten up by expenses. We think the court, under the circumstances, very properly terminated the trust.

We agree also that \$550 was a reasonable allowance and estimate of the damages which the plaintiffs' estate suffered by reason of the failure of the defendants to act more promptly and energetically. In reaching this conclusion we have taken into consideration the fact that the plaintiffs themselves were pulling and hauling, and more or less embarrassing the defendants, in the

administration of their trust. Nevertheless, we think the defendants were to blame themselves in the matter.

It seems, however, that the court below in its decree overlooked the \$250 which it had allowed to Ganoe in its findings as a fee in the divorce proceedings. It seems to have been assumed in the court below and by all the parties that the court should adjudicate the amount of all these fees and claims. Acting upon this assumption we think the defendant Ganoe should have been allowed this \$250. It is argued upon behalf of the defendant Ganoe that this allowance should have been larger, but on the whole in view of all the circumstances we think it was an amply sufficient recompense for his services in the divorce matter.

2, 3. We also think that some provision should be made in the decree, in relation to the \$300 borrowed by the defendants as trustees to pay the taxes and other expenses on the property, and the \$350 afterwards borrowed to buy the furniture left in the house by Mrs. Hanson, and to buy the Stacy judgment against her, under which that property might be levied upon and held. We think the defendants acted in good faith in relation to these matters and they ought not to lose the money they put up for the benefit of the estate. It does not appear clearly from the record in the case just how much is still due and outstanding upon these notes, nor does it appear satisfactorily whether the defendants are personally liable thereon. We think the decree should provide that any amount due upon these notes, which has not already been paid out of the trust funds, should be paid or the defendants discharged in some way from liability before plaintiffs can have a reconveyance of the trust properties. The amount due to the defendants for their services ought also to be paid by the plaintiffs before a reconveyance.

4. It is urged that there are other creditors who have an interest in this trust, but such creditors have not been made parties, nor have they intervened in any way. It seems that the property of plaintiffs is ample to protect all the rights of these other creditors, whether the trust is continued or terminated, and when the trust is being constantly operated at a loss, we do not think it should be continued, for the purpose of securing their claims.

The decree of the court below should be modified by adding \$250 to the credit of the defendant H. L. Ganoe, thereby giving him a judgment against Emil Kiesen-dahl for \$166.49. The decree also should be modified by making the reconveyance of the property, subject to and upon a satisfaction of the note given by the trustees to the Northwestern Bank for \$300, and \$350, respectively, or any renewals of the same after allowing for all payments which have been made thereon out of the trust fund.

Under the circumstances of this case we think neither party should recover costs either in this court or in the court below. MODIFIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued at Pendleton October 27, affirmed December 9, 1919.

LUN v. MAHAFFEY.

(185 Pac. 746.)

Trover and Conversion—Leasehold Interest not Personal Chattel.

1. A leasehold interest in a building for a five-year term was not a personal chattel, and therefore not the subject of trover.

Pleading—Code Requires Concise Statement of Facts.

2. The Code does not require a pleader to conform his statement of facts to any of the common-law forms of action, a complaint contain-

ing a plain and concise statement of the facts constituting the cause of action being sufficient.

Landlord and Tenant—Sufficiency of Complaint in Action for Unlawful Ouster.

3. In action by lessee's assignee against lessor for damages for unlawful ouster, complaint *held* sufficient.

Pleading—Departure in Action for Unlawful Ouster.

4. In action by lessee's assignee against lessor for unlawful ouster, where complaint alleged performance of requirements of lease by both plaintiff and her assignee in possession, reply alleging collusion or conspiracy between plaintiff's assignee and lessor in order to enable lessor to terminate lease, being inconsistent with complaint, was a departure therefrom.

Pleading—Departure in Action for Unlawful Ouster.

5. In action for unlawful ouster by assignee of lease against lessor, where complaint alleged absolute performance of conditions of lease, reply pleading lessor's waiver of assignee's nonperformance of conditions of lease *held* a departure.

Landlord and Tenant—Landlord's Right to Re-enter.

6. Where lease gave lessor right to re-enter and repossess herself of premises upon nonpayment of rent within 10 days after rent shall become due, lessor's re-entry upon premises after lessee's assignee had been in arrears for more than 10 days, and after forfeiture had been declared, did not entitle assignee to damages for unlawful ouster, but would have justified a directed verdict for defendant.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This was an action to recover damages for an alleged unlawful ouster of plaintiff from certain premises to which she claims the right of possession under an assignment of a lease. The complaint alleges in substance that on October 5, 1918, the defendant, Maggie D. Mahaffey, the owner of the property, leased the premises occupied by plaintiff to Margaret Keiffer from November 1, 1913, to December 31, 1919, at a monthly rental of \$50 until January 1, 1919, and thereafter at a rental of \$60 per month, the said premises comprising the second floor of the Mahaffey Building in La Grande, Oregon; that on August 7, 1915, Mrs. Keiffer, with the written consent of defendant Ma-

haffey, assigned said lease to plaintiff, who went into possession; and that she or her representatives remained in possession until April 1, 1918, when defendants wrongfully ousted plaintiff and her representative therefrom by force, and still wrongfully and unlawfully withhold the possession of said premises to plaintiff's damage in the sum of \$1,200. It is further alleged that subsequent to said lease, plaintiff and her representatives had furnished the premises as a rooming-house and were using the second floor as such and the remainder of the leased premises for store purposes and had built up a good, paying business by reason of which other persons were anxious to obtain the property; that on February 4, 1918, plaintiff entered into an agreement with one Sadie Davis whereby the latter agreed to buy and plaintiff to sell said lease, furniture, fixtures and goodwill of said business for \$1,800, payable at the rate of \$50 a month; and that Sadie Davis went into possession of said premises and was holding and operating the same under said option to buy and had paid \$100 thereon at the time she was ousted from said premises, and was promptly keeping up her payments under such option, but because defendants wrongfully and unlawfully ousted plaintiff and her representative therefrom, the said Sadie Davis thereafter threw up her option and would no longer comply with the same or any part thereof, to plaintiff's special damage in the sum of \$1,200. The plaintiff states that her special damage is this, that the premises were especially furnished to carry on the business in which she and her representative were engaged; that the furnishings were not of greater value than \$500, but when left therein and used in connection with said business, were of the value of \$1,700, and that when defendants ousted plaintiff and her rep-

representative from the premises they wrongfully converted all the property therein belonging to plaintiff, including the business and goodwill save the furnishings and the value thereof, in said sum of \$500, leaving a net damage to plaintiff in the sum of \$1,200.

The plaintiff avers that she and Sadie Davis had complied with all of the terms of said lease on their, or either of their, parts and were not in default when said ouster was made.

There is a further allegation to the effect that defendant Sargent aided and abetted defendant Maggie Mahaffey in the perpetration of the wrongs charged, and the prayer is for damages in the sum of \$1,200.

The answer admits the existence of the lease and the assignment thereof from Keiffer to plaintiff, subject to all the terms and conditions of the original lease, but denies the allegation of wrongful ouster and all the other averments of the complaint except as to matter set forth in the separate answer and defense.

For a separate answer and defense defendants set up *in haec verba* the original lease from Mahaffey to Keiffer, in which appeared the following covenants:

"The party of the second part shall not sublet said premises or any part thereof, nor take in any partner, nor make any alterations or repairs to the said premises or any part thereof, without the written consent of the party of the first part, neither shall any assignment of this lease be made without the written consent of the party of the first part thereto.

"Should the party of the second part violate any of the conditions herein contained, or should the party of the second part be in arrears in the payment of rent for a period exceeding ten days, the party of the first part or her legal representatives, may at once declare this lease forfeited, and may at once re-enter and repossess herself of the said premises, as of her former estate therein, forcibly if necessary, without in any

manner being deemed guilty of trespass, or waiving any rights for the collection of any arrearages of rent."

It is then alleged that on August 7, 1915, Keiffer, with the written consent of defendant Mahaffey, assigned the lease to plaintiff, subject to all the terms and conditions of the original agreement.

It is next alleged that on March 12, 1918, the rent for the month of March was not paid by plaintiff, although it was due and payable on March 1st, and was in arrears on March 12th; that by the terms of the lease plaintiff was in default and the lease forfeited by reason of nonpayment of rent, and that thereupon defendant Mahaffey exercised her option and declared the lease forfeited, and re-entered and took possession of the premises.

The answer charges that the plaintiff, without the knowledge or consent of the lessor, contracted to and did sublet the premises to one Sadie Davis, in violation of the terms of her agreement, and thereby forfeited her lease; whereupon defendant Mahaffey declared the lease forfeited and re-entered and took possession of the premises. It is further alleged that on March 12, 1918, defendant Sargent as the attorney and agent of defendant Mahaffey, sent the following notice to plaintiff, which was duly received by her on March 13, 1918.

"La Grande, Oregon, March 12th, 1918.

"Mrs. Zellah May Lun,

"North Powder, Oregon.

"Madam:

"You are hereby notified that the lease on the second floor of the Mahaffey Building and the north store-room of said building and middle basement thereof, held by you as assignee of Margaret E. Keiffer, is hereby terminated, for the reason that the rent is

more than ten days in arrears, and the lease has been otherwise violated.

"Yours truly,

"W. B. SARGENT,

"Agent and Attorney for Maggie D. Mahaffey."

Plaintiff replied, admitting the existence and terms of the lease and the assignment by Keiffer, the fact that Sargent was the agent of Mahaffey, and the sending and receipt of the notice of forfeiture. The reply denies all other matter in the answer and contains the following affirmative allegations:

"That the rental under the lease mentioned in said answer and for several months prior to the month of March, 1918, had been paid by the said Sadie Davis mentioned in said answer under her option to purchase the said rooming-house business, as described in the complaint herein and the lease thereon; and had for several months prior to and including the said month of March, 1918, occupied said leased property and had operated and run the same solely by herself for said time with full knowledge and consent of defendants, and without any objection in her so doing under the aforesaid option from said defendants or either of them or at all; that for said several months, including the month of March, 1918, the said rentals were all tendered within the time called for in said lease, and were all paid during each month to said defendants by the said Sadie Davis under her option as aforesaid, and said rentals were accepted by defendants therefor.

"That during all the times mentioned in the last paragraph above, the defendants resided in the city of La Grande, Oregon, and the defendant Maggie D. Mahaffey on the lower floor of said Oregon rooming house, and by reason of the premises has waived any right to object to said occupation of said premises by the said Sadie Davis under her option aforesaid. * *

"That one Sadie Davis, now Sadie Johnson, conspired and colluded with defendants to terminate the lease set out in the answer herein, by which collusion defendants were to rent said premises to one Roberts,

who was to hold the same and did hold the same in trust for said Sadie Johnson, and defendants were to receive \$70 instead of \$60 monthly rentals, and said defendants were to and did evict plaintiff from said leased premises, by which plaintiff was thereafter forced to sustain the loss and damage as mentioned in her complaint and the same was done for the purpose and intent of unlawfully accomplishing the objects and purpose above stated and by reason thereof did accomplish the same."

The defendants demurred to the separate matter set forth in the reply, on the ground that (1) it did not state facts sufficient to constitute a defense; (2) the facts stated did not constitute a waiver; and (3) it was a departure from the cause of action stated in the complaint. The demurrer was sustained and the cause came on for trial.

Exceptions were saved to numerous objections to instructions given by the court and to the refusal of the court to give others requested by plaintiff, but in our view of the issues these objections become immaterial. At the conclusion of plaintiff's testimony a motion for nonsuit on behalf of Sargent was allowed. The jury returned a verdict for defendant Mahaffey and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. O. B. Mount*.

For respondents there was a brief over the names of *Mr. R. J. Green* and *Mr. W. B. Sargent*, with an oral argument by *Mr. Green*.

McBRIDE, C. J.—There is an interesting discussion in the briefs of counsel as to whether this is an action in trover or on trespass. We think the distinction of little consequence, although the complaint lacks many

of the elements of an action of trover and none of those which are required in an action of trespass.

The gist of the controversy here is the unlawful entry upon the premises of plaintiff, ousting her therefrom and withholding possession from her. The removal of the plaintiff's goods to another place is merely aggravation of the trespass.

"Trover" is defined by Bouvier to be:

"A form of action which lies to recover damages against one who has without right converted to his own use the goods or personal chattels in which the plaintiff has a general or special property."

1-3. Plaintiff's leasehold interest in the building was not a "personal chattel" and therefore not the subject of trover. However, the distinctions argued by counsel are not material here, as it was never the intent of our Code to require a pleader to conform his statement of facts to any of the common-law forms of action. If his complaint contains "a plain and concise statement of the facts constituting his cause of action," it is sufficient, although it may sound partly in trover and partly in trespass. The complaint here is sufficient.

4. The first error alleged is the action of the court in sustaining the demurrer to plaintiff's further and separate reply. The complaint alleged performance of all the requirements of the lease, both by the plaintiff and by Sadie Davis, her optionee or assignee in possession, and a wrongful and unlawful ouster of both by defendants; the reply alleges a collusion or conspiracy between Sadie Davis and the defendants in the trespasses and wrongs of defendants, in order to enable the defendants to terminate the lease and make a new contract with herself. In the complaint Sadie Davis was held out as a co-victim with plaintiff of the wrongful acts of the defendants. In the reply she was held out

as a conspirator with defendants in their alleged nefarious scheme to injure plaintiff. In this particular the reply is inconsistent with the complaint, constitutes a departure, and as such was vulnerable to the objection made.

5. The same is true as to the waiver attempted to be pleaded in the further and separate reply. As before remarked, the complaint proceeded upon the basis of absolute performance and it was inconsistent with that theory to plead a waiver of performance, or a waiver of any of the conditions of the lease. The conditions under which Sadie Davis was permitted to occupy the premises were as much a necessary part of plaintiff's complaint as was the fact that Mrs. Mahaffey consented in writing to the assignment of the lease from Keiffer to plaintiff. If the allegations of the complaint are true, Davis never had possession except as the representative of plaintiff. Her possession would, upon the theory of the complaint, be plaintiff's possession and an ouster of her would be an ouster of plaintiff.

The plea is clearly a departure. The plaintiff says in substance by her complaint, "I performed and kept all the conditions of the lease." By her separate reply she says:

"If I did not perform the conditions of the lease as to subletting, or by assigning it, such condition was waived."

In 6 Ency. Pl. & Pr., page 462, quoted in defendants' brief, it is said:

"Performance, and excuse for nonperformance, are two distinct matters, and a party must aver with certainty upon which one he depends. Where the declaration or complaint avers performance, and to a plea of nonperformance there is a replication or reply of excuse for nonperformance, there is a departure."

Such is the holding in this state. In *Waller v. City of New York Ins. Co.*, 84 Or. 284 (164 Pac. 959), Mr. Justice BURNETT states the rule as follows:

"It is a rule of pleading in this state that where the plaintiff relies upon a contract he must show full performance on his part or else some valid excuse, as an example of which latter waiver may be classed, and that all this must appear in his complaint. In other words, the plaintiff must state his whole cause of action and all the grounds thereof in his first pleading. He cannot aver there that he has fully complied with the contract and, when charged in the answer with shortcomings in that respect, shift his ground in his reply and show that the omissions stated by the defendant were waived by it, thus excusing the plaintiff from performance."

The practice thus condemned is precisely what was attempted in the further separate reply.

6. This leaves plaintiff's case in this position: She comes into court pleading full performance of all the conditions of the lease, including payment of the stipulated rent not later than March 12th, when the whole competent testimony on this subject shows that rent was not paid or tendered until after the time for payment had expired and a forfeiture had been declared. Whatever errors may have crept into the case, these facts settled the contention in favor of defendants and in themselves would have justified a directed verdict in their favor. This view renders it unnecessary to discuss the question as to the effect of Mrs. Mahaffey's written consent to the assignment of the lease from Mrs. Keiffer to plaintiff, which has been so ably presented by counsel for plaintiff.

The judgment is affirmed.

AFFIRMED.

Argued at Pendleton October 28th, affirmed December 9, 1919.

STATE v. CRAIG.

(185 Pac. 764.)

Perjury—Oath Before County Assessor.

1. Perjury cannot be predicated on false list of taxable property sworn to before county assessor, since assessor is not authorized by Section 3591, L. O. L., as amended by Laws of 1913, Chapter 184, Section 4, or any other statute, to administer oath; authority to administer oath being, in every instance, expressly given (Section 889, L. O. L.), and not left to implication.

Taxation—Statute Giving Assessor Authority to Administer Oath Repealed.

2. Act of 1854 (Deady's Code, c. 2, § 3; B. & C. Comp., § 3059), requiring the assessor to swear every person subject to taxation, was expressly repealed by Laws of 1907, Chapter 268, Section 39.

Oath—Assessor has No Authority to Administer Oath.

3. There is no law upon the statute books of Oregon authorizing assessor to administer oath.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc.

In this case the defendant was indicted for the crime of perjury, committed by falsely and corruptly making oath to the correctness of the list of his taxable property in Wallowa County for the year 1918. The indictment, which seems in proper form, states, among other matters, that C. H. Allen was the county assessor and as such called upon the defendant to furnish a list containing a true account of all his personal property in Wallowa County subject to taxation, and that he furnished a list purporting to be such and swore to the same before said C. H. Allen, who was duly authorized to administer said oath. Other allegations sufficiently charge perjury if by law the county assessor is authorized to administer an oath. The defendant demurred to the indictment and the demurrer being sustained, the state appeals.

AFFIRMED.

For the State there was a brief and an oral argument by *Mr. A. Fairchild*, District Attorney.

For respondent there was a brief and an oral argument by *Mr. Daniel W. Sheahan*.

McBRIDE, C. J.—1. It requires no citation of authorities to show that perjury cannot be predicated upon a false oath taken before an officer or person not authorized by law to administer it.

Section 3591, L. O. L., as amended by Section 4 of Chapter 184, General Laws of 1913, omitting matters not relevant here, is as follows:

“Owner to furnish lists and values: Penalty for refusal. Every assessor shall require every person liable to be taxed in his county and to be assessed by him * * to furnish such assessor:

“1. A list of all the real estate of such person, * * situate in his county and liable to taxation. * * ;

“2. A list of all the personal property of such person, * * liable to taxation in his county * * ;

“The assessor shall require such person * * to make oath that, to the best of his knowledge and belief, such list, whether of real or personal property, or of both, contains a full and true account of all the real and personal property, or both, or of any interest therein, of such person * * liable to be taxed in said county, and the true cash value of such real or personal property, or both, and of the several parcels or items thereof. Should any such person * * when so required, refuse to furnish such list of real or personal property, with the true cash value or values thereof, or to swear to the same when required to do so by the assessor, such person, * * shall forfeit and pay to the assessor, for the use of the county, * * Should any such person, * * when so required, refuse to furnish and to swear to any such list, the assessor shall ascertain the taxable property of such person, * * and shall

appraise the same from the best information to be derived from other sources."

While the above-quoted section provides that the assessor shall "require" the person making the list to swear to its correctness, we find no indication as to who is to administer the oath.

By Section 889, L. O. L., it is provided that every court, judge of a court, justice of the peace or notary public, is authorized to administer oaths generally, and other persons in the particular case authorized. Among the persons so particularly authorized we find county clerks, sheriffs upon trials before a sheriff's jury; county surveyors upon road survey proceedings, coroners, upon inquest proceedings, and many other instances of like character, but in each instance the authority is expressly given and not left to conjecture or implication.

It does not follow by necessary implication that because the assessor is directed to require a taxpayer to furnish him a written statement under oath of his personal property, that such statement must be sworn to before him. Indeed it is neither practicable or customary for the assessor to personally visit every person in his county and personally demand of him the list required by law. The usual custom in the large counties is for the assessor to mail to each taxpayer a printed form with directions to fill it out properly and return it. If required by the assessor, he must return it verified by his oath, administered by any person authorized to administer oaths.

2. From 1854 until 1907 there was upon the statute book an express provision requiring the assessor to "swear every person subject to taxation to give a true account of his or her property, according to the best of his or her knowledge or belief": Deady's Code, § 3,

Chap. 2, p. 628; B. & C. Comp., § 3059. This provision was expressly repealed by Section 39 of Chapter 268, Gen. Laws 1907.

It is not conceivable that the legislature would repeal an express law commanding the assessor to administer the necessary oath, if it was the legislative intent that he should continue to administer it. From this repeal and subsequent legislation, we are of the opinion that it was the intent of the legislature to authorize the assessor to demand of any taxpayer a sworn list of his property; but that it was not the intent to require or authorize him to visit the taxpayer personally to administer the oath.

3. There is in every precinct in this state a justice of the peace who can conveniently perform that duty, and in addition there are usually notaries public whose services can be conveniently obtained. These considerations possibly prompted the repeal of this provision of the act of 1854 by the legislature of 1907. Be this as it may, the provision was repealed and there is not now upon the statute books any law authorizing the assessor to administer an oath.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Motion to dismiss appeal filed November 13, allowed December 16, 1919.

STATE EX REL. v. BEMROSE.

(185 Pac. 765.)

Appeal and Error—Entry in Court Journal Evidence of Notice of Appeal in Open Court.

1. Under Section 550, L. O. L., as amended by Gen. Laws of 1913, page 617, Section 1, requiring entry in the court journal of notice of appeal, when given in open court, such entry constitutes the

only proof admissible of the giving of such notice, being equivalent to the proof or return made upon written notice served in the usual manner.

Appeal and Error—Statutory Method to be Strictly Pursued.

2. The right of appeal being statutory, the method prescribed by statute must be strictly pursued.

From Lincoln: JAMES W. HAMILTON, Judge.

In Banc.

Motion to dismiss appeal allowed.

APPEAL DISMISSED.

Mr. C. E. Hawkins, District Attorney, and *Messrs. McFadden & Clarke*, for the motion.

Mr. B. F. Jones, *contra*.

McBRIDE, C. J.—This is a motion to dismiss an appeal.

1. There was a proceeding to oust the defendant from the office of school director of District No. 27, Lincoln County, and a decree adjudging that he was not elected to said office and declaring the same vacant. No written notice of appeal was ever served and there is no record in the journal of the court that any notice of appeal was given in open court. The undertaking on appeal recites that notice was given in open court but as before stated, the journal is silent on that subject.

Section 550, L. O. L., as amended by Section 1, Chapter 319, Gen. Laws of 1913, provides that when notice of the appeal is given in open court, "such notice shall thereupon, by order of the court or judge thereof, be entered in the journal of the court."

2. This entry constitutes the only proof admissible of the giving of such notice, and is equivalent to the proof or return made upon a written notice served in

the usual manner. The object of the requirement is to secure certainty as to the giving of the notice and to have proof of it made a matter of record at the time instead of leaving the matter to the uncertain memory of the parties. An appeal, being a statutory right, the method prescribed by statute must be strictly pursued: *Donart v. Stewart*, 63 Or. 76 (126 Pac. 608); *Lewis v. Chamberlain*, 61 Or. 150 (121 Pac. 430); *Baskin v. Marion County*, 70 Or. 363 (141 Pac. 1014), and cases there cited.

It follows that the appeal must be dismissed, and it is so ordered.

APPEAL DISMISSED.

Motion to dismiss appeal filed May 3, overruled May 20, argued on the merits October 29, affirmed December 16, 1919.

PARMAN v. PARMAN.

(180 Pac. 906; 185 Pac. 922.)

Divorce—Appeal—Notice of Appeal—Service upon District Attorney.

1. In divorce suit, where district attorney was not served with summons, but personally appeared, and his appearance was noted in the record at the trial, an appeal could be taken from the decree rendered without serving him with notice of appeal, since his appearance, though it conferred jurisdiction, did not, in absence of some motion or other pleading filed by him, confer upon state any right to be heard further in the case.

ON THE MERITS.

Divorce—Untidiness of Wife not Cruelty.

2. Where defendant wife bore six children during the 10 years of her married life and did most of the cooking and housework for her husband and the hired men on his large ranch, her untidiness was not ground for divorce, as cruel and inhuman treatment.

[As to habits or conduct of spouse as cruelty warranting divorce, see note in *Ann. Cas.* 1918B, 480.]

Divorce—Charge of Infidelity Cruelty.

3. Defendant's wife's intimation to plaintiff husband that he had been guilty of improper conduct with another woman held not cruel

and inhuman conduct warranting divorce, she having had reasonable grounds for suspicion.

Evidence—Judicial Notice Taken of Nervous Condition Attending Pregnancy.

4. It is a well-known fact that in a condition of advanced pregnancy women are more sensitive and more suspicious than they are at other times.

Divorce—Evidence Insufficient to Show Cruel and Inhuman Treatment by Wife.

5. Husband *held* not entitled to divorce for cruel and inhuman treatment.

From Wheeler: FRED W. WILSON, Judge.

In Banc.

This is a suit for divorce. The district attorney was not served with summons, but personally appeared, and his appearance was noted in the record at the trial. There was a decree dismissing the suit, and plaintiff appeals. The district attorney was not served with notice of the appeal, and defendant moves to dismiss the appeal for that reason. **OVERRULED.**

Messrs. Kimball & Ringo, for the motion.

Messrs. Angell & Fisher, contra.

PER CURIAM.—1. In *De Foe v. De Foe*, 88 Or. 549 (169 Pac. 128, 172 Pac. 980), this court, speaking of the appearance of a district attorney without service of summons, or filing any pleading, said:

“While such appearance of the district attorney confers jurisdiction, it does not in the absence of some motion or other pleading filed by him, confer upon the state any right of appeal, or any right to be heard further in the case,” etc.

We still adhere to this statement of the law, and the motion to dismiss will be overruled.

OVERRULED.

Affirmed December 16, 1919.

ON THE MERITS.

(185 Pac. 922.)

The plaintiff and defendant were married at Condon, Oregon, on October 3, 1907, and lived together as man and wife until about September, 1917. During that time six children were born to the plaintiff and defendant, four of them still living and two were born dead. During the first years of their married life the plaintiff and defendant seemed to have gotten along moderately well. There was perhaps some bickering and disagreement, but probably not more than often occurs in the marriage relation. During the last year or two, however, there was more serious quarreling and at the time of their separation it seems to have been mutually agreed that the defendant should remove with two of the children to Portland, while the plaintiff should remain at their home, which was then in Wheeler County.

The divorce is sought by the plaintiff on the grounds of alleged cruel and inhuman treatment. It is claimed that during their entire married life the defendant was a poor housekeeper—extravagant in the management of the house—and untidy in her person and in her manner of housekeeping and in the taking care of the children, and that she was also of a jealous and nagging disposition. It is also alleged that just prior to the separation she falsely accused the defendant of improper relations with another woman.

The defendant claims that her removal to Portland was temporary and that she never did agree to a final and permanent separation.

Shortly after her removal to Portland, however, she and plaintiff executed an agreement for a division of the property, by which she was to receive \$5,000, and he was to have the remainder of the property they had accumulated during their marriage, and shortly afterwards the \$5,000 was actually paid over by the plaintiff to the defendant.

There was nothing in the contract in relation to the separation of the parties, and it had no relation to the divorce. It is provided therein:

"It is understood and agreed however that in the event a decree of divorce is not granted, this property adjustment shall be binding and shall have the same force and effect as though a decree should be granted."

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Angell & Fisher*, with an oral argument by *Mr. Homer D. Angell*.

For respondent there was a brief over the name of *Messrs. Kimball & Ringo*, with an oral argument by *Mr. Ernest R. Ringo*.

BENNETT, J.—The court below came to the conclusion that the testimony on behalf of plaintiff was too weak to sustain a decree for a divorce, and in this we concur.

2. The evidence in the case seems to strongly support the contention of the plaintiff, that the defendant was at least at times somewhat untidy in her house-keeping and in caring for the children and herself, but we think that such untidiness under the circumstances would not be a just cause for a dissolution of the marriage bonds.

When plaintiff and defendant were married it is conceded by all parties that defendant was inexperienced in household matters. During the ten years of her married life with the plaintiff, she bore the plaintiff six children, so that they were, on an average, only a little more than eighteen months apart. It follows that there was only a small portion of the time when she was not either carrying an unborn child or nursing that child and recovering from the illness of childbirth. The plaintiff was running a large ranch, and had more or less hired men about the place all the time, and at some seasons of the year a considerable number. During a good part of the time the defendant did the work for the household, although she generally had help when there were a large number of men. However, it was no slight task at any time for a woman to keep house, cook for her husband and what men there were upon the place, and take care of her numerous small family. With such frequent increases in the family and the accompanying aggravations and disabilities it must have been a very severe trial. Under such circumstances it would not be strange if her housekeeping was not of the best, or if her children or herself sometimes were neglected in their personal appearance and condition.

No doubt this was sometimes annoying to the plaintiff, who seems to have been a man of rather unusual neatness, but he should have remembered that he was as much responsible as his wife for the rapid increase of the family, and the resulting conditions to her health.

People marry in this world for "worse" as well as for "better," and it is not often in the marriage relation that both parties do not find much in the way of fault in the other party which they had not expected

and which they must bear with patience what they cannot better by love and affection. We think there was nothing in the habits or conduct of the defendant in this regard, which even approximated "cruel and inhuman treatment," as defined by the authorities.

3. The most serious matter complained of by the plaintiff is the charge, or intimation, on the part of the defendant, that the plaintiff had been guilty of improper conduct with Mrs. Wineberger. It seems that a month or two before the separation, the defendant came downstairs one night after putting the children to bed, and while she was in the living-room, the plaintiff came out of the dining-room in his stocking feet, carrying his shoes. Mrs. Wineberger's room opened off of the dining-room at the left of the door as one came from the dining-room to the living-room. The kitchen and bathroom also opened off from the dining-room, and the door from the dining-room to the kitchen was almost directly opposite the door from the dining-room to the living-room.

The plaintiff claims he had been through the dining-room into the kitchen to get a drink before going to bed; but the defendant claims that from where she stood, she could see right through to the kitchen door; and that plaintiff did not come out of that door, but that he came from towards Mrs. Wineberger's room, and brushed against that side of the door as he came through into the living-room from the dining-room.

Mrs. Wineberger was a neighbor living on a homestead in one of plaintiff's pastures, and she and her husband were working for the plaintiff at that time. Her husband, however, had gone to town or off somewhere that day, and Mr. Parman and Mrs. Wineberger seem to have been the only persons in the lower part of the house at the time. After her hus-

band came through the room Mrs. Parman went into the dining-room and found the door leading from the dining-room into Mrs. Wineberger's room ajar. She opened the door and went into the room and shook Mrs. Wineberger, but got no response. Mrs. Wineberger either was, or pretended to be, so sound asleep that she could not be wakened in that way.

The plaintiff does not claim that Mrs. Parman accused him directly of improper relation. She says she did not.

"No, sir; I simply asked him the question if he had been in her room that night. Of course I suppose it was an intimation in a way that such a thing might have been. Mr. Parman evidently took it that way."

We agree with the trial court that there was no sufficient evidence of any improper relation between plaintiff and Mrs. Wineberger at that time to justify a finding against him in that regard. We also think, however, that Mrs. Parman had some reasonable ground for suspicion.

Mrs. Parman testifies that previous to that—

"I discovered along in the winter—I don't remember what time—Mrs. Wineberger was acting peculiarly with the men especially, and I went to Mr. Parman about it, and he decided that there were improper relations between them. I think he went to Mr. Wineberger about it and warned the men also."

So that, from her standpoint at least, Mrs. Wineberger was not a woman above all reproach.

Then again there had been another incident some time before, in which another hired girl accused the plaintiff of being too familiar with her in the presence of both plaintiff and defendant. Mr. Parman denies that there has been anything wrong between him and that girl, but he admits she made the accusa-

tion. Under these circumstances Mrs. Parman certainly had some reason to doubt whether her husband was above temptation in matters of this kind. If, as she testifies, she found her husband coming from the direction of Mrs. Wineberger's room, in his stocking feet, with his shoes in his hand, at a time when she was supposed to have retired, and when there was no one in that portion of the house but her husband and Mrs. Wineberger, and upon going to the room she found the door ajar, and Mrs. Wineberger pretending to sleep so soundly that she could not be wakened by shaking, it was natural that she should be somewhat disturbed by the circumstances.

4. It all happened at a time when Mrs. Parman was pregnant and expecting daily that her baby would be born. It is a well-known fact that under such circumstances women are more sensitive and more suspicious than they are at other times. Under such circumstances we cannot say that it was cruel and inhuman for her to express her doubts to her husband. Nor do we think it was sufficient reason, under all the circumstances, for the plaintiff to put her away from him and demand a separation, as he did about two weeks afterwards, when she must have been still sick from the loss of her baby, according to his own evidence.

It is urged on behalf of plaintiff that while no one of the acts complained of by plaintiff might be sufficient cause for divorce, yet altogether and in the aggregate they are sufficient, but we think not. The actions complained of cover a long period of time—about ten years—and they are gathered from time to time by witnesses who were generally hostile to the defendant.

After the defendant had lived with her husband on the farm near Condon for several years, the plaintiff's brother also moved upon the farm with his wife and one of plaintiff's sisters, and they continued to live on the farm for some years. Naturally trouble grew between the women of the two families. They quarreled about the management of the place, and there has been a very bitter feeling ever since. Weighing their evidence in this light, taking into consideration all the circumstances, we do not think that any shortcomings of the defendant are sufficient to justify putting her away or granting a divorce.

The plaintiff cites the case of *Lisenby v. Lisenby*, 89 Or. 273 (173 Pac. 888). But that case was a much stronger case for the plaintiff than the one at bar. In the *Lisenby* case, according to the evidence of the plaintiff, the defendant had utterly refused to live with him, unless he lived in the house with her father and mother, and both she and her relatives in her presence had frequently sneered at him and talked insultingly to him. When he finally asked her to go away from them and live with him she flatly refused; and at the trial when the court undertook to act as intermediary and to induce her to go back to her husband, who was willing to take her back, she again openly and flatly refused.

Here there are no such circumstances. The defendant, on the other hand, testifies that she has never consented to a permanent separation, and she does not consent to such separation now, and announces herself as willing to continue the marriage relation.

The plaintiff, in his testimony, substantially admits that he has been the moving party in demanding a separation, and that his wife never did wish to separate. It is true that she signed the agreement in

relation to the division of the property, but that was not a separation agreement, and the plaintiff seems to have been the moving party in the execution of that agreement, as well as in demanding the separation.

Even after this suit was brought the plaintiff and the defendant had at one time almost reconciled their differences and had agreed upon going back together to live, but they failed to agree upon a rearrangement of their property; and the plaintiff then decided to continue the divorce proceedings. The plaintiff demanded that as a condition of their remaining together the defendant repay to him the \$5,000 he had turned over to her. She says she doubted his fairness in the matter and was not willing to do that, unless he would cause certain real property, to which she had signed deeds, to be deeded back to her and him jointly, which he refused to do. This does not seem an unreasonable requirement upon her part.

Upon the whole, the plaintiff and defendant seem to have lived together with reasonable happiness up at least until the year 1916. On March 13th of that year, upon the occasion of the loss of their fifth child, plaintiff wrote a letter to the defendant, running over with affection and winding up,

"Good-bye sweetheart, and remember that your husband thinks of you and *loves you every minute.*"

It is plain from this letter that their life together up to that time could not have been so very unhappy.

About this time, or shortly after the Wineberger woman moved into the neighborhood. Whether it is a simple coincidence that about that time the plaintiff commenced to have a coldness toward the defendant, we cannot say. It appears in evidence, however, that since the separation, which the plaintiff insisted

upon, he has been visiting and corresponding with Mrs. Wineberger. She remained at his house a short time after the defendant moved away, and afterwards the plaintiff visited her in Portland and took her out to a show and on an automobile excursion over to Vancouver. Afterwards she moved to Ashland and the plaintiff visited her there. It is due to him to say that he claims to have been up there on business matters, and this may be true; but he also says he has written her a number of letters since she left his place. In view of the fact that the trouble between himself and his wife was about this woman, it seems strange that he should have paid her so much attention.

5. Whether, now that she has passed out of the lives of plaintiff and defendant, and ceased to be a cause of friction, they can ever resume their happy marriage relations is a matter of conjecture, but we think the evidence in the case, on behalf of plaintiff, is too weak to justify a divorce decree in his favor. Decree affirmed.

AFFIRMED.

BURNETT, J., concurs in the result.

Motion to dismiss appeal submitted at Pendleton May 5, denied June 24, argued on the merits at Pendleton October 27, modified and affirmed December 16, 1919.

FIRST NAT. BANK OF UNION v. WEGENER.
(HALL, INTERVENER.)

**WRIGHT v. WEGENER. (LA GRANDE NAT,
BANK, INTERVENER.)**

(181 Pac. 990; 186 Pac. 41.)

Appeal and Error—Notice of Appeal—Sufficiency.

1. Where two cases were virtually, if not formally, consolidated for trial, a single notice of appeal, describing both decrees, *held* a sufficient notice for both cases.

Appeal and Error—Notice of Appeal—Service.

2. Under Section 550, L. O. L., providing that notice of appeal may be served on adverse party or his attorney, and Section 540, authorizing service by mail where person to be served resides in a different place, a notice of appeal may be served by mail on attorney residing in another county, though parties themselves reside in same place.

ON THE MERITS.

Chattel Mortgages—Right of Possession in Mortgagor Until Breach of Conditions.

3. Under a chattel mortgage the right of possession remains in mortgagor until there is a breach of the conditions after which the mortgagee has the qualified title giving him possession.

Chattel Mortgages—Bill of Sale in Substance Chattel Mortgage.

4. An instrument in form of bill of sale, providing that upon compliance with certain conditions by seller the sale should become null and void, *held*, in substance, a chattel mortgage.

Chattel Mortgages—Valid as Between Mortgagor and Mortgagee Though not Recorded.

5. A chattel mortgage is valid as between the parties, though not of record.

Bankruptcy—Trustee as Against Chattel Mortgagee Under Unfiled Mortgage Stands in Position of Attaching Creditor.

6. Under Bankruptcy Act as amended in 1910 (U. S. Comp. Stats., § 9631), a trustee in bankruptcy, as against the rights of a chattel mortgagee under an unfiled chattel mortgage, stands in the position of an attaching creditor, and his rights are determined as of the date the petition in bankruptcy was filed.

Bankruptcy—Chattel Mortgage, Recorded as Bill of Sale Against Trustee in Bankruptcy, Valid Pending Foreclosure.

7. Where instrument in form of bill of sale, but in substance a chattel mortgage, was filed and recorded as bill of sale at the time of

the filing of bankruptcy proceedings against mortgagor, and mortgagee at time thereof had possession of the property covered by the mortgage, and action was then pending by mortgagee to foreclose the mortgage, the mortgage lien was good as against trustee in bankruptcy, though the instrument was recorded as a bill of sale instead of as a chattel mortgage.

Bankruptcy—Notice to Trustee in Bankruptcy of Chattel Mortgage on Bankrupt's Property Sufficient.

8. Where at the time of the filing of bankruptcy proceedings against mortgagor, an action to foreclose labor liens against the lumber covered by the mortgage was pending, wherein an affidavit had been filed referring to chattel mortgage on the property, and where the bankrupt's petition referred to such mortgage, the trustee in bankruptcy upon adjudication of bankruptcy had legal notice of such mortgage, though it was not of record.

Chattel Mortgages—No Attorney's Fees Allowed on Foreclosure.

9. In foreclosing chattel mortgage no attorney's fees should have been allowed, where there was no provision for payment thereof in either note or mortgage.

Logs and Logging—Right to Laborers' Liens is Statutory.

10. The right to a laborer's lien on lumber is statutory, and in the absence of a specific law such a right would not exist.

Logs and Logging—Statute Giving Labor Lien Liberally Construed.

11. Section 7462, L. O. L., giving lien for labor performed in the manufacture of lumber, is remedial, and should be liberally construed in favor of the lien.

Logs and Logging—Laborers' Lien Lost by Removal of Lumber.

12. Under Section 7462, L. O. L., giving lien for services performed in the manufacture of lumber while the same remains at the yard wherein manufactured, laborers had no lien upon lumber which had been hauled 12 miles from the yard wherein it was manufactured, in view of Sections 7464-7467.

Logs and Logging—Liens for Cutting Logs and Manufacturing Lumber Distinct.

13. Section 7461, L. O. L., giving laborer lien for labor in the cutting of logs, and Section 7462, providing for laborers' lien for labor performed in the manufacture of lumber, though parts of the same act are separate and distinct from each other; the former being intended for security to the logger and the latter to the operators in the mill.

Logs and Logging—Lien Statement must Specify Labor Cutting Logs and Manufacturing Lumber.

14. Even if laborer could make and enforce a joint or dual lien for services in cutting logs under Section 7461, L. O. L., and in manufacturing lumber under Section 7462, he would be required to specify in his statement the amount and value of his labor for cutting logs, and the amount and value thereof in manufacturing lumber.

Logs and Logging—Lien for Outting Logs Covers Lumber Manufactured Therefrom.

15. Under Section 7461, L. O. L., a logger has a lien, not only upon the logs cut, but upon the lumber manufactured therefrom, so long as it can be followed and identified.

Logs and Logging—Enforcement of Lien Notwithstanding Surplusage in Lien Statement.

16. Where the laborers were paid in full at the time of the removal of sawmill to a new site, the lien for labor will be enforced as to the lumber at the new site, though the claim was for a lien on all of the lumber, including that on the old site.

Logs and Logging—Attorney's Fee Granted on Foreclosure of Lien Reasonable.

17. Under the evidence, *held*, that \$250 is a reasonable attorney's fee for foreclosing of 14 laborers' liens on lumber.

BEAN, J., dissenting in part.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The foregoing causes arise out of the insolvency of the White Pine Lumber Company, a partnership engaged in the lumbering business in Union County, Oregon. The Lumber Company, evidently being in straightened circumstances in the conduct of its business, secured a loan from the respondent, First National Bank of Union, Oregon, and gave a promissory note and a chattel mortgage upon certain of its lumber product to secure the payment of the note. It also secured a like loan from the La Grande National Bank of La Grande, Oregon, and gave another mortgage upon certain other lumber not covered by the mortgage to the Union Bank.

The appellant, P. C. Wright, is the holder of the lien claim of a large number of the employees of the Lumber Company, and as such claims loggers' and lumbermen's lien upon the lumber covered by the mortgages of each of the banks. The appellant Hall is the trustee in bankruptcy of the lumber company, and

as such trustee claims possession and the right to administer on all of the property in dispute.

The respondent, First National Bank of Union, commenced a suit against the Lumber Company to foreclose its mortgage and made Wright, as representing the lien claimants, a party defendant. Afterwards, Wright commenced a suit to foreclose his loggers' and lumbermen's liens and made the First National Bank of Union a party defendant. It was stipulated that the complaint in this case should stand as an answer to the complaint of the First National Bank of Union. Afterwards the La Grande National Bank intervened and asked for the foreclosure of its mortgage upon the lumber covered thereby.

The appellant Hall also intervened as a defendant and, as trustee in bankruptcy, claimed possession of all the property. By stipulation of the parties and an order of the court based thereon the cases were tried together upon the same evidence but separate decrees were entered.

In the Wright case the court found against the plaintiffs and in favor of the La Grande National Bank, decreeing the foreclosure of its mortgage upon the lumber covered thereby, and that the balance of the same, if there was any, should be turned over to the defendant, Geo. F. Hall, as trustee in bankruptcy. In the case of the First National Bank of Union, the court also found against the lien claimants and in favor of the bank, and decreed the foreclosure of its mortgage upon the lumber covered by it. Wright, the plaintiff in one case and defendant in the other, is attempting to appeal from both decrees; and the defendant Hall, as trustee in bankruptcy, has also filed a similar notice of appeal. This case comes up

now solely upon motions to dismiss the different appeals.

The appellant Wright served a single notice of appeal, in which he appeals severally from each of the decrees entered in the two suits, describing each of them fully and separately in the notice. He served the notice of appeal on the intervening defendant Hall, by mailing a copy of the same to John L. Rand, his attorney in Baker City. It is claimed that Wright's notice of appeal is fatally defective because there was only one notice covering both decrees; and also because, as is claimed, a notice of appeal cannot be served by mail where the *parties* reside in the same place, even if the attorneys for one of them reside in another county.

The notice of appeal filed by Hall is also a double notice, and the first ground of the motion as to the Wright notice applies equally to that of Hall.

MOTION DENIED.

Messrs. Crawford & Eakin, Messrs. Cochran & Eberhard and Mr. B. F. Wilson, for the motion.

Mr. John L. Rand, Mr. J. H. Nichols, Mr. R. J. Green and Mr. H. E. Dixon, contra.

BENNETT, J.—We are of the opinion that the motion to dismiss in the Wright case is not well taken. There seems to have been a virtual, if not a formal, consolidation of the cases for trial.

1. It is very plain from the notice that Wright intends to appeal and does appeal from both decrees; and indeed each decree is separately and fully described. It is impossible that the adverse party should have been in any way misled. Perhaps it might have been more appropriate to have served an

entirely distinct and separate notice in each case, but we cannot say under the circumstances and conditions of the record that the notice was fatally defective as to either one. Certainly it would not be defective as to both, and it would be impossible to distinguish and say that it would be defective in one and not in the other.

It is urged that the effect of this duplicate appeal would be to save a filing fee in one case or the other. Whether or not this is true, we do not think it would justify us in dismissing an appeal where the notice sufficiently describes each of the decrees, and fully notifies the adverse parties that it is the intention to appeal from each of them.

2. As to the service by mail, we are of the opinion that that also is sufficient. Section 550, L. O. L., as amended, provides that the notice of appeal shall be served upon the adverse party, "or upon his or their attorney *at any place in the state.*" Section 540, L. O. L., in regard to service by mail, provides:

"Service by mail may be made when the *person* for whom the service is made, and the *person* upon whom it is to be made, resides in different places."

Under these sections the appellant Wright had the option to serve his notice of appeal either upon the party individually, or upon his attorney, at any place in the state; and having selected that option in favor of the attorney, such attorney became the "person" who was being served and he living at a different place, to wit: the town of Baker, the service upon him could be properly made by mail. This seems the natural construction of the language, but besides this, it is the usual and we think the appropriate practice, where there is an attorney of record to serve the notice of appeal upon him, even although such attor-

ney does reside out of the county. This being a proper and usual thing to do, the service can unquestionably be made by mail.

What is said above in regard to the Wright appeal, also disposes of the motion to dismiss the appeal of the intervener, Hall. The double notice of appeal in his case was somewhat more general than in the Wright case, but we think it was sufficient under the holding in *Robinson v. Phegley*, 93 Or. 299 (177 Pac. 942, 178 Pac. 799, 182 Pac. 373); *Fraley v. Hoban*, 69 Or. 180 (133 Pac. 1190, 137 Pac. 751), and *Tucker v. Nuding*, 92 Or. 319 (180 Pac. 903).

The motion to dismiss the appeal in both cases is denied.

DENIED.

Modified and affirmed December 16, 1919.

ON THE MERITS.

(186 Pac. 41.)

In Banc.

This case came before the court on a motion to dismiss the appeal, which was overruled: 181 Pac. 990.

MODIFIED AND AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. R. J. Green* and *Mr. H. E. Dixon*.

For respondent there was a brief over the names of *Messrs. Crawford & Eakin* and *Mr. B. F. Wilson*, with an oral argument by *Mr. T. H. Crawford*.

For intervener, George F. Hall, there was a brief over the names of *Mr. John L. Rand* and *Mr. George H. Nichols*, with an oral argument by *Mr. John L. Rand*.

For defendant, La Grande National Bank, there was a brief submitted by *Messrs. Crawford & Eakin*.

JOHNS, J.—On June 26, 1918, the First National Bank of Union filed its complaint against C. F. Wegener, L. E. McCarthy and W. W. Markle, partners under the firm name of Western White Pine Lumber Company; A. M. Stonedahl and M. F. Davis, partners as Stonedahl & Davis; P. C. Wright, and later George F. Hall, trustee, as defendants, in which it is alleged that on December 6, 1917, the plaintiff loaned to the defendant company \$1,575, for which the latter then executed its note to the bank, payable six months after date; that on December 7, 1917, the plaintiff loaned to the defendant company \$1,550, taking a note therefor; and that on the latter date the company executed and delivered to the plaintiff a certain bill of sale of 304,500 feet of lumber, of which 31,000 feet was then piled on the yards of the company at what is known as the Haggerty site in Union County, to secure the payment of these promissory notes, which instrument was duly filed in the office of the county clerk of Union County and entered in Book C, at page 172, Record of Bills of Sale. It is next alleged that on February 9, 1918, the plaintiff made a further loan of \$1,100 to the defendant company, for which it took the company's demand note; that on April 8, 1918, the defendant company executed to the Union Bank another note for \$1,800 payable six months after date, and that on the same date it delivered to the Union Bank its certain bill of sale of 265,000 feet of lumber on the Haggerty site, which was duly filed and recorded as a bill of sale on April 9, 1918, in Book C, page 185, Record of Bills of Sale, and which was intended to secure the payment of the two promissory notes last above described. It is next alleged that on May 7, 1918, as evidence of a loan then

made, the defendant company executed to the plaintiff its certain promissory note for \$5,000, payable in six months, and on that date, to secure the payment of the note, executed another bill of sale of the 265,000 feet of lumber on the Haggerty site, that being the same lumber for which it had given a bill of sale on April 8, 1918, together with 192,000 feet of lumber then in the millyards at the same place, which instrument was entered in Book C, page 187, Record of Bills of Sale. The plaintiff claims that all of the lumber covered by the three bills of sale, amounting to 761,000 feet, was hauled from the millyards where manufactured and is now piled on the yards of the defendant company at Union; that between June 1 and 17, 1918, for the hauling and piling of the lumber and paying insurance thereon the plaintiff expended, at the instance and request of the defendant company, \$1,886.76; and that further to secure the payment of the said notes and advances the company, on June 3, 1918, delivered to the plaintiff the actual possession of all of the lumber covered by said bills of sale, and that since that date the plaintiff has been and now is in the exclusive possession of all of the said lumber as security for the payment of the several sums of money mentioned.

The plaintiff prays for the usual decree of foreclosure of the bills of sale as chattel mortgages, the sale of the lumber and the application of the proceeds to its claims, and that such claims be declared superior in right and time to all other demands against this defendant.

At the time of the filing of the complaint herein the defendant P. C. Wright had commenced a suit to foreclose his own and some thirty-four assigned liens for labor performed in cutting logs and manufactur-

ing lumber for the defendant company. By stipulation the complaint of Wright was made his answer in the suit of this plaintiff, wherein he pleads that between May 1 and June 5, 1918, at the instance and request of the defendant company he performed work, labor and service upon and assisted in obtaining saw-logs, spars, piling and other timber for it, and performed labor upon and assisted in manufacturing the same into lumber, which is that described in the plaintiff's complaint; that his services were of the reasonable value of \$209.50, and that to protect and preserve his lien, on June 8, 1918, he filed with the county clerk of Union County a claim containing a statement of his demand, which was recorded on page 74 of Book E, Records of Liens, and of which a copy is attached to his pleading as exhibit "1." His second cause of suit is a similar claim of one J. C. Gilmore. Then follow twenty-one like causes of suit, representing liens for labor on both lumber and timber, all of which were assigned to Wright.

For a separate cause of suit, Wright alleges that between the dates last above mentioned, one Harry Proctor performed work, labor and services upon and assisted in manufacturing said logs and other timber into lumber, for which he filed his lien on June 8, 1918, a copy of which is attached to the pleading and marked "exhibit 24." Like allegations are made as to eleven further causes of suit, all of which are assigned to the defendant Wright, who as plaintiff in his suit prayed for a decree for the sale of the logs and lumber, the application of the proceeds thereof on the payment of the labor liens, and that all of such liens be declared prior in time and right to the claims of the plaintiff and to all other demands against the defendant company.

To this answer the plaintiff filed a general denial of all material allegations and as a reply alleged the execution of the bills of sale described in this complaint; that all of the 761,000 feet of lumber had been manufactured at the mill and millyards of the defendant company on the Haggerty site and prior to the filing of such liens had been removed from the said millyards where manufactured and hauled to and piled in the lumber-yards at Union, a distance of ten or twelve miles; that "none of the labor or assistance in logging or in manufacturing the logs into lumber, for which the plaintiff claims a lien in this case in his several causes of suit, was labor or assistance in the logging or manufacturing of said logs into the 761,000 feet of lumber now upon the lumber-yards at Union, Oregon," covered by the bills of sale to the plaintiff and then in its possession in the said yards; and that such lumber "was not lienable or subject to lien in favor of the laborers for the work and labor performed by them or their assistance rendered between the first day of May, 1918, and the fifth day of June, 1918, or any part thereof." The plaintiff then disclaims any right or interest in the 400,000 feet of sawlogs or the 75,000 feet of lumber located on the Railroad site, then the millyard of the defendant company, or the 300,000 feet of lumber in the yard at the Haggerty place.

Upon petition of P. C. Wright and order of the court, La Grande National Bank of La Grande, Oregon, was made a defendant, and filed its answer alleging that on April 9, 1918, it loaned to the defendant company \$1,400 and took therefor its note payable in ninety days, and that to secure the payment thereof the defendant company executed to that bank its bill of sale of 200,000 feet of lumber then on its yards at

the Haggerty site, which instrument was recorded in the office of the county clerk of Union County in Book C, page 186, Record of Bills of Sale, on April 10, 1918. It also alleges that the bill of sale specified that the defendant company would not "waste or destroy the lumber above mentioned, nor suffer it nor any part thereof to be attached on mesne process"; but that the defendant company has allowed the lumber in question to be attached and the alleged liens to be filed thereon; that the bill of sale was intended to be and was in fact a chattel mortgage and was a first and prior lien on the 200,000 feet of lumber therein described; that none of the labor liens represented claims for work or labor performed in obtaining the logs from which the lumber in question was sawed or manufactured; that all of such labor was performed long subsequent to the manufacture of that lumber, and that the same was not lienable therefor. This bank prayed for a decree for the amount of its note, to foreclose its bill of sale as a chattel mortgage, for the sale of the 200,000 feet of lumber described therein and the application of the proceeds to the payment of its claim.

As a reply, the defendant Wright made a general denial of all of the material allegations of the answer of the La Grande Bank.

On July 8, 1918, the defendant company was adjudicated to be bankrupt by the United States District Court for the State of Oregon, George F. Hall was appointed trustee and on petition and order of the court he was made a defendant here. On August 29, 1918, he filed his answer, denying all of the material averments of either of the banks or the lien claimants and alleging affirmatively that he was in possession "of all of the assets and property" of the defendant

company and was "preserving said property and administering the same subject to the orders of said court of bankruptcy." He prayed for a decree that he be entitled to such possession, "to dispose of the said property and to distribute the same among the creditors of the said" bankrupt company.

The defendants Stonedahl and Davis were attaching creditors whose lien in legal effect was dissolved by the adjudication of bankruptcy, and for such reason made no defense.

For the purpose of trial, the cases in which P. C. Wright and the Union Bank were plaintiffs were consolidated, and they will be so treated in this opinion.

The trial court made findings of fact and conclusions of law and rendered a decree in favor of the Union Bank for the full amount of its claim; that its bills of sale were in effect chattel mortgages; directing that the 700,000 feet of lumber then on the yards of the defendant company at Union be sold and the proceeds first applied to the payment of its claim; that this was a first and prior lien on the lumber; that the alleged liens of P. C. Wright and his assignors for labor were null and void, and that the rights of the trustee, Hall, to any property of the company were subject to the lien of the Union Bank.

A like decree was entered in favor of the La Grande Bank, directing the sale of the 200,000 feet of lumber on the Haggerty site and the application of the proceeds to the satisfaction of its claim.

An appeal was taken by the defendant Wright and the defendant Hall as trustee, both claiming that neither of the banks was entitled to any lien, the defendant Wright contending that he should have a prior lien for the full amount of the claims for labor, and the trustee insisting that all liens against the lum-

ber were null and void and that he was entitled to possession of all of the property as trustee for the use and benefit of the creditors of the bankrupt company.

The first transaction between the Union Bank and the defendant company is evidenced by two promissory notes and a written instrument, in form a bill of sale and in substance a chattel mortgage, which contains the following provisions:

"That if the grantors, their executors, administrators or assigns, shall pay unto the grantee or its assigns, the sum of (\$3,125.00) Thirty One Hundred Twenty Five and no/100 Dollars in six months from this date, with interest semi-annually at the rate of 8% per annum, and, until such payment, shall not waste or destroy the lumber above mentioned, nor suffer it, nor any part thereof, to be attached on mesne process (labor liens, etc.,) and shall not, except with the consent in writing of the grantee or its assigns, attempt to remove the same or sell the same, then this deed as also the note of even date herewith, signed by the said Western White Pine Lumber Company; whereby the said Western White Pine Lumber Company promises to pay to the grantee, or order, the said sum and interest at the time aforesaid, shall become null and void.

"But upon any default in the performance of the foregoing conditions, the said Western White Pine Lumber Company does hereby grant, bargain, sell and convey unto the said First National Bank of Union, Union, Oregon, the foregoing described chattels."

This was followed by the remaining notes and written instrument above described, which were never filed, indexed or recorded as chattel mortgages and all of which in legal effect contained the above provisions. From an inspection of the first instrument it is apparent that except as to amount, date and descriptions, the alleged chattel mortgage to the La Grande Bank

was copied from a like instrument previously executed and delivered by the defendant company to the Union Bank. Each note was for the amount of money which the bank then loaned and paid over to the defendant company. At the trial the alleged chattel mortgages were received in evidence over objection of counsel for the trustee, upon the ground that they "were filed and recorded as bills of sale, and not as chattel mortgages." The statute does not provide for the recording of a bill of sale and the record thereof as legal notice is a nullity: *Nicklin v. Betts Spring Co.*, 11 Or. 406 (5 Pac. 51, 50 Am. Rep. 477).

By Section 7407, L. O. L., it was enacted:

"Every mortgage, deed of trust, conveyance, or instrument of writing intended to operate as a mortgage of personal property, either alone or with real property, hereafter made, which shall not be accompanied with immediate delivery and followed by the actual and continual change of possession of the personal property mortgages, or which shall not be recorded as provided in Section 7405, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property, or any portion thereof."

3-5. In *Ayre v. Hixson*, 53 Or. 19 (98 Pac. 515, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659), it is held that a chattel mortgage does not transfer title, but merely creates a lien. The right to possession remains in the mortgagor until there is a breach of the conditions, after which the mortgagee has the qualified title, giving him possession: *Swank v. Elwert*, 55 Or. 487-495 (105 Pac. 901). Upon the face of the instruments it appears that they were intended to be chattel mortgages to secure the respective claims of the banks upon the property therein described, and without record they were valid as such between the parties.

As to the Union Bank the testimony is conclusive that it took actual possession of the lumber described in its "bills of sale" on June 3, 1918, and has been in such possession ever since. This assertion of ownership was followed by its suit in the Circuit Court of Union County to foreclose its "bills of sale" as chattel mortgages, wherein the court had jurisdiction of the subject matter and of the parties thereto, and constructive possession of the lumber described in the bills of sale and the labor liens.

All of the money evidenced by the notes to the banks was then actually loaned to the defendant company and by it used in the payment of labor, in particular, and current monthly expenses. In fact, the labor account was paid in full from January 1 to May 1, 1918, with the money obtained from the banks. There is no proof or allegation that either of the banks knew at the time the respective loans were made that the defendant company was insolvent or that either of the loans was not bankable, or that there was any fraudulent motive or intent in the failure or neglect to have the instruments filed and indexed as chattel mortgages. Nor is there any evidence that either of the banks was not acting in good faith in all of its transactions with the defendant company. There is no allegation that any creditor of the defendant company was misled or deceived, or was induced to extend credit by reason of the failure to have the "bills of sale" recorded as chattel mortgages.

The petition in bankruptcy was filed by the defendant company and it was adjudged a bankrupt on July 8, 1918. Hence, at the time of the adjudication there was pending in the Circuit Court of Union County the suit of the Union Bank to foreclose its liens as chattel mortgages, and that bank had been

in actual possession of the lumber at the Union yards from and after June 3, 1918.

6. Under the 1910 amendment (Act June 25, 1916, c. 412, Section 8, 36 Stat. 840 [U. S. Comp. Stats., § 9631]) of the bankruptcy act (July 1, 1898, c. 541, § 47, 30 Stat. 557), as construed by numerous decisions of the federal courts, "a trustee in bankruptcy as against the rights of a chattel mortgagee under an unfiled chattel mortgage, stands in the position of an attaching creditor," and "the rights of a trustee in bankruptcy as against a mortgagee under an unfiled chattel mortgage are determined as of the date the petition in bankruptcy was filed": *Lake View State Bank v. Jones, Trustee*, 40 Am. Bankr. Rep. 148, 242 Fed. 821, 155 C. C. A. 409.

"A bill of sale, executed by the bankrupts in order to avoid the sacrifice likely to result from a sale under execution, which had been advertised and intended as security for the debt due, is a chattel mortgage and void as against the trustee in bankruptcy of the judgment debtor, unless filed for record or unless possession was taken by the mortgagee prior to the date of the filing of the petition in bankruptcy upon which adjudication was eventually had.

"A trustee in bankruptcy, since the amendment of 1910 to Section 47a (2) of the Bankruptcy Act, now stands in the relation of a creditor having obtained a lien by levy of an attachment or execution as and of the date of filing of the petition in bankruptcy": *Matter of Schilling and Loller*, 41 Am. Bankr. Rep. 698.

"Where conditional contracts were filed for record before the filing of a petition in bankruptcy, the trustee in bankruptcy acquired no rights greater than those which would be acquired by creditors who on the day that the petition in bankruptcy was filed secured a lien by attachment or otherwise.

"The rights of a trustee in bankruptcy vest as of the date of the filing of the petition in bankruptcy.

"A mortgage, executed more than four months before the bankruptcy petition is filed, is valid as against the trustee, even though the same is not recorded until three days previous to the filing of the petition in bankruptcy, where there is no claim of preference": *Emerson-Brantingham Co. v. Lawson, Trustee* (D. C.), 38 Am. Bankr. Rep. 344, 237 Fed. 877.

In construing the 1910 amendment of the bankruptcy act, Black on Bankruptcy (1914 ed.), Sections 365 and 366, says:

"The trustee is no longer in the situation of a general creditor, but occupies the more favorable position of a judgment or execution creditor, and can resist the enforcement of any lien which would be invalid as against a creditor of that class.

"As to recording, the rule appears to be well established that a mortgage which was valid when executed and entirely free from fraud is not invalidated in the bankruptcy proceedings simply because it was not placed on the record until after the debtor had become insolvent or until shortly before the filing of the petition in bankruptcy, provided it is not shown that there was any fraudulent purpose in so withholding it from the record, and if the law of the state is such that recording is not necessary to its validity as between the parties."

In Collier on Bankruptcy (11 ed.), page 729, it is said:

"The class of cases, unprovided for by the original act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens."

By Judge WITMER, in *In re Hartdagen* (D. C.), 189 Fed. 546, 549, it is held:

“This provision of the bankruptcy act puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor.”

—distinguishing the case of *Ycrk Mfg. Co. v. Cassell*, 201 U. S. 344 (50 L. Ed. 782, 26 Sup. Ct. Rep. 481, see, also, *Rose's U. S. Notes*), and similar cases.

Jones on Chattel Mortgages (4 ed.), Section 178, says in part:

“Delivery of possession under a mortgage, before rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient description of the property, an insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties; as, for instance, an agreement that the mortgagor may retain possession and sell a stock of goods in the usual course of trade.”

This excerpt is quoted with approval in *Kenney v. Hurlburt*, 88 Or. 688-700 (172 Pac. 490, 173 Pac. 158, Ann. Cas. 1918E, 737, L. R. A. 1918E, 652).

Loveland on Bankruptcy, volume 1, Section 444, page 922, states that:

“The taking possession by a mortgagee under a chattel mortgage or conditional sale is equivalent to recording.”

7. We hold that the Union Bank had a valid chattel mortgage lien, and that as to it the decree of the Circuit Court should be affirmed.

The claim of the La Grande Bank presents a more serious question. Its attorneys state in their briefs and the trial court found that the bill of sale given it by the defendant company was indexed as a chattel

mortgage. If that were true, a much stronger case would be presented, but we have searched the record in vain for any evidence that would show or tend to show that its bill of sale was ever indexed by the county clerk as a chattel mortgage.

On June 26, 1918, P. C. Wright, as plaintiff in his suit, filed a motion based upon an affidavit of one of his attorneys for an order of court that the La Grande Bank be made a defendant. The order was made and that bank filed its answer, from which it appears:

"That in order to secure the payment of the said promissory note, principal and interest, in accordance with the tenor and purport thereof, the said defendant Western White Pine Lumber Company then and there made, executed and delivered, to the said defendant La Grande National Bank, a bill of sale of two hundred thousand (200,000) feet board measure, of pine, fir and tamarack lumber. * *

"That said bill of sale, although absolute upon its face, was intended to be and was in fact a chattel mortgage to secure the payment of said sum of \$1,400 evidenced by said promissory note."

To this pleading P. C. Wright filed his reply on July 5, 1918. Hence at the time of the bankruptcy adjudication, beside the suit of the Union bank there was pending the suit of Wright, in which he claimed liens for a large number of laborers for the cutting of logs and the manufacture of lumber.

In the Wright suit an affidavit was then of record from which it appeared that the La Grande bank "has or claims to have a lien or interest in the property mentioned in the complaint," and that the bank named "has or claims to have some lien by way of mortgage on certain of the property described in the complaint, and is therefore a necessary party defendant in this case." The La Grande bank had then filed its answer, setting forth in full detail all its dealings with the de-

fendant company, the execution of the bill of sale, the facts tending to show that the instrument was a chattel mortgage, and the nature and extent of its claim, all of which was a matter of record in the pending suits at the time of the bankrupt adjudication.

From an examination of the record it will be found that the labor liens were all duly filed in the office of the county clerk of Union County on or about June 8, 1918, and were then a matter of record. In addition to this it appeared from the debtor's bankrupt petition, attached as an exhibit and made a part thereof under the heading, "Creditors holding securities," the following:

"Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partners or joint contractor with any other person, and if so with whom."

Each note of the Union bank is then listed and described, together with that held by the La Grande bank, and the statement shows that each note was "attempted to be secured by a bill of sale which holder is attempting to have declared a chattel mortgage."

In Remington on Bankruptcy (2 ed.), Section 1270, with reference to the 1910 amendment of the bankruptcy act, the author lays down the rule that:

"The trustee, as to all property in the custody or coming into the custody of the bankruptcy court, is, in addition to his other rights, to be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court is to be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Assuming that Hall, as trustee, actually had the custody of the 200,000 feet of lumber on the Haggerty site, on which the La Grande bank claimed a chattel mortgage lien, and that as such trustee on July 8, 1918, he had all the rights of a lien creditor, he then legally knew that laborers' liens had been duly filed on that lumber and were then a matter of record in the office of the county clerk, and a further search would have disclosed the fact that a suit was then pending to foreclose those liens, wherein the La Grande bank had been made a party defendant because of its claim of lien and had filed its answer, fully setting forth the nature and extent of its claim and its right to such lien, and praying for affirmative relief. It also appeared upon the face of the petition by which the defendant company was adjudicated bankrupt and Hall was elected trustee that each bank had or claimed to have a chattel mortgage lien upon the lumber in controversy. All of such facts existed and were a matter of record at the time of the adjudication on July 8, 1918, when Hall acquired his title as trustee.

In the case of *Posson v. Guaranty Loan Assn.*, 44 Or. 106 (74 Pac. 923), this court held:

"It is now settled that the assignment or transfer by a defendant of his interest in the subject matter of the litigation during its pendency does not defeat the suit, but that his purchaser is bound by any judgment or decree that may be rendered therein. * * An assignee who acquires title to the subject matter of the litigation after the filing of the complaint takes *pendente lite*, and is bound by the proceedings against his assignor."

8. Under the facts disclosed by the record, we hold that when the bankrupt adjudication was made and Hall was elected trustee, he legally knew of the existence of the written instrument held by the La Grande

bank, in form a bill of sale and in substance a chattel mortgage, and that it was intended to be a chattel mortgage to secure the \$1,400 note of the defendant company owned by that bank.

9. While the Circuit Court allowed the La Grande bank \$150 as attorneys' fees, there is no provision in either note or alleged chattel mortgage for the payment of any such fees. The amount is reasonable, but no attorneys' fees should have been allowed, and that was error. The decree of the Circuit Court as to the La Grande bank is modified in regard to the allowance of attorneys' fees, and in all other respects is affirmed.

As to the labor liens, it appears that the defendant operated its mill and cut all of its lumber at the Haggerty site until about May 1, 1918, and that during that month about 450,000 feet of lumber there cut was hauled to the defendant company's yards at Union. About May 1st the defendant company moved its mill from the Haggerty site to what is known as the Railroad site, and at the time the laborers' liens were filed there was about 75,000 feet of lumber in that yard. The Haggerty site is on Catherine Creek, at least twelve miles from the defendant company's yard at Union, and the Railroad site is about one mile from the Haggerty place. No lumber was ever cut or manufactured in the company's yards at Union, and any placed there was hauled at least twelve miles from the Haggerty site, at which the sawmill was first located and the logs were manufactured into lumber.

There is no dispute as to the amount of the liens for labor and it appears that the men were paid in full for their work up to May 1, 1918, but that within a short time after the Union bank took possession of the lumber in the Union yards, under its claims, the laborers

prepared their respective liens and duly filed them of record on and after June 8, 1918.

Section 7461, L. O. L., is as follows:

“Every person performing labor upon or who shall assist in obtaining or securing sawlogs, spars, piles, or other timber, has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging camp, and any and all others who may assist in or about a logging camp, shall be regarded as a person who assists in obtaining or securing the sawlogs, spars, piles, or other timber herein mentioned.”

And Section 7462, L. O. L., provides:

“Every person performing labor upon, or who shall assist in manufacturing sawlogs or other timber into lumber, has a lien upon such lumber while the same remains at the yard wherein manufactured, whether such work or labor was done at the instance of the owner of such lumber or his agent.”

It is shown that twenty-four of the liens were “filed for labor performed upon and assistance rendered in cutting and manufacturing said logs and lumber.” The remaining liens are for work and labor performed “in manufacturing said lumber now on the mill sites.” It is contended that the lumber liens are void as to the lumber in the Union yards. Section 7462 gives the laborers “a lien upon such lumber while the same remains at the yard wherein manufactured.” The defendant company never had a sawmill or manufactured any lumber at or in its Union yards, and any lumber lying there was hauled a distance of at least twelve miles from the yards where it had been manufactured. The lienholders contend that the lumber was hauled to the Union yards for the purpose of cutting the ends and

trimming it ready for market. But the fact remains that none of the lumber was ever cut or trimmed there and that the company did not have any machinery actually installed or prepared to do that work at the Union yards. It is significant that the only lumber which was actually sold and shipped was removed from Union to La Grande for the purpose of having it edged and trimmed there.

10-12. The right to a laborer's lien is statutory and in the absence of a specific law such a right would not exist. The law gives a lien upon lumber only "while the same remains at the yard wherein manufactured." After the lumber is removed from the "yard wherein manufactured," the right to file a lien is lost. Although it is true that the lien statute is remedial and should be liberally construed in favor of a lien for such labor, yet we do not know of any legal principle, and counsel have cited no authority, which would sustain a laborer's lien upon lumber which had been hauled twelve miles from the yard "wherein manufactured."

By Section 7464, L. O. L., it was enacted that:

"The liens provided for in this act are preferred liens, and are prior to any and all other liens, and no sale, transfer, mortgage or assignment of any sawlogs, spars, piles or other timber or manufactured lumber, shall divert the lien thereon as herein provided. * * "

Section 7465, L. O. L., is as follows:

"The person rendering the service or doing the work or labor named in Sections 7461 and 7462 is only entitled to the liens as provided herein for services, work, or labor, for the period of six months, or any part thereof next preceding the filing of the claims as provided in Section 7467."

Section 7466, L. O. L., provides:

"The person granting the privilege mentioned in Section 7463 is only entitled to the lien as provided therein for sawlogs, spars, piles and other timber cut during the six months next preceding the filing of the claim as provided in Section 7467."

Section 7467, L. O. L., is in part as follows:

"Every person, within thirty days after the close of the rendition of the services, or after the close of the work or labor mentioned in Sections 7461 and 7462, claiming the benefit hereof, must file for record with the county clerk of the county in which such sawlogs, spars, piles, or other timber was cut, or in which such lumber was manufactured, a claim containing a statement of his demands and the amount thereof, * * and it shall also contain a description of the property to be charged with the lien, sufficient for identification with reasonable certainty."

There are twenty-four claimants who filed liens "for labor performed upon and assistance rendered in cutting and manufacturing said logs and lumber" and who state in their liens that they "performed such labor upon and assisted in cutting and manufacturing said logs and lumber for the period of — days." There is nothing in the liens or in the proof which tends to show or from which this court can determine how many days' labor was performed by either of them in the cutting of logs or in the manufacture of lumber. Mr. Wright, who was superintendent of the defendant company, testified that no separate account of such labor was kept. He says that the men were transferred from one employment to another and some of them worked different days in cutting the logs and in manufacturing the lumber, and that there was no way by which it could be ascertained how many days any particular employee worked in cutting logs or in manufacturing lumber. For such reason no separate

liens could be filed and the amount of labor in the cutting of logs could not be segregated from that performed in the manufacture of lumber.

13. While Sections 7461 and 7462, L. O. L., are parts of the same act, they are separate and distinct from each other. The former section gives a lien to the logger, the latter provides for a lien for the manufacture of lumber. Each is complete within itself, as to the right of lien. One section gives a lien upon logs which may have been cut, and the other upon the manufactured lumber, so long as the same remains "at the yard wherein manufactured." Logs are cut in the timber and removed to the mill, where they are manufactured into lumber, which is then piled in the yards. As held by this court in *Day v. Green*, 63 Or. 293-295 (127 Pac. 772, 773):

"The two sections were intended to meet different classes of cases, the one for security to the logger, and the other to the operators in the mill."

14. Under Section 7467, L. O. L., it is the duty of the lien claimant to file "a claim containing a statement of his demand." Assuming, without deciding, that he could make and enforce a joint or dual lien for services under Sections 7461 and 7462, it would still be the duty of the lien claimant in his statement to specify the amount and value of his labor for cutting logs and the amount and value thereof in manufacturing lumber.

15. While it is true, and this court has held, that a logger has a lien not only upon the logs which he cuts, but upon the lumber manufactured therefrom, so long as it can be followed and identified: *Schultz v. Shively*, 72 Or. 450 (143 Pac. 1115), it must be conceded that a laborer who has a lien for his services in the manufacture of lumber does not have and could not enforce

a lien therefor upon sawlogs before the same are cut into lumber. Although a logger may pursue and enforce his particular lien upon lumber manufactured from the logs upon which he has performed labor, so long as he can follow and identify it, the lien to the laborer for manufacturing lumber is confined and limited to the lumber "while the same remains at the yard wherein manufactured." Counsel have not cited and we have not found any authority which would give a laborer the right to a dual or unsegregated lien for his labor on both logs and lumber under Sections 7461 and 7462; and in the absence of both allegation and proof as to the amount of labor in cutting the logs, as distinguished from that used in the manufacture of lumber, we hold that such liens are void.

The record shows that the following lien claimants, for their respective amount, filed liens for labor in the manufacture of lumber only:

J. P. Sayer.....	\$ 55.02
L. F. Ingram.....	31.23
John Julian.....	99.50
Albert Stocker	107.54
C. H. Gibson.....	99.00
W. H. Horn.....	104.00
E. A. Hardman	107.50
John Brown	35.33
Fred Peterson	57.25
James Davis	65.67
V. C. Addelman.....	118.50
Harry Proctor	23.00
Henry Cooley	299.25
Clifford Horstman	113.75

16. While such claims are on all of the lumber at the mill yard on the Haggerty site, they are also upon the 75,000 feet of lumber then in the yard on the Railroad site. The evidence shows that the laborers were

paid in full to May 1, 1918, at which time the sawmill was moved from the Haggerty to the Railroad site, and all of the labor covered by the amounts of the respective liens must have been performed in the manufacture of the 75,000 feet of lumber then at the Railroad site. While these claimants would not have any lien on the lumber at the Union yard or at the Haggerty site, they would have a right to liens upon the lumber at the Railroad site which they had there manufactured after the removal of the plant on May 1st. The labor for which they filed liens must have been performed in the manufacture of lumber which was in the yard at the Railroad site at the time of filing their claims. This renders their respective liens definite and certain as to the amount of their claims, and when and where the labor was performed, conclusively shows that it was performed in the manufacture of the 75,000 feet of lumber on the Railroad site, and clearly brings the claims within the law laid down by this court in *Alderson v. Lee*, 52 Or. 92, 96 (96 Pac. 234, 236), where it is held:

“The lumber upon which the liens are sought is in fact segregated, and the claims for labor, as allowed by the Circuit Court, each clearly specify the character of the labor and contract price therefor, and come within the provisions of the statute covering the character of labor designated therein. The lienable lumber is at the mill, and the part not subject to liens is at the railroad track, about one mile distant; and the reference to the latter in the lien notices is mere surplusage, as much so as if it had referred to cattle or horses belonging to the Lee Bros. Co., ranging in the vicinity.”

As to the lumber liens, the decree will be modified, sustaining the respective claims on the 75,000 feet of lumber only, at the Railroad site of the defendant company.

17. Attorney Ivanhoe testified that \$500 would be a reasonable attorney's fee for the foreclosure of all of the labor liens. That is the only evidence on the subject in the record. Based upon that testimony we hold the view that \$250 would be a reasonable attorney's fee to be allowed for the foreclosure of the fourteen liens above described.

A decree will be entered here affirming the decree of the Circuit Court as to the Union bank and as to the La Grande bank, except the allowance of \$150 as attorney's fee there, which was erroneous, and in favor of P. C. Wright for the fourteen liens for labor on lumber only, on the 75,000 feet of lumber on the Railroad site, together with \$250 as attorney's fees for the foreclosure of the same. In all other respects the decree of the Circuit Court is affirmed, neither party to recover costs in either court. **MODIFIED AND AFFIRMED.**

BENNETT, J., concurs in the result.

BEAN, J., Concurring in Part and Dissenting in Part. I concur in the able opinion of Mr. Justice JOHNS, except as to that part relating to the segregating of the items of labor for which liens are claimed. It is held that it is "the duty of the lien claimant in his statement to specify the amount and value of his labor for cutting logs and the amount and value thereof in manufacturing lumber." The statute creating the lien makes no such requirement. The act of 1891, of which Sections 7461 and 7462, L. O. L., are a part, contemplates that but one notice of lien shall be filed for work performed on logs and for labor done in sawing the same. This is clear from a careful reading of Section 7467, L. O. L., providing for the notice of lien. When one man or ten men should be engaged for three or four days in securing logs and immediately thereafter

should labor in sawing the same at a mill, it cannot be suggested that any good would be obtained in specifying how much time was consumed in logging and how much in work in the mill. A requirement that such should be done in proving a lien is highly technical and not a carrying out of the legislative intent. In *Robins v. Paulson*, 30 Wash. 459 (70 Pac. 1113), it was said by Mr. Justice DUNBAR that:

"The actual sawing of the timber is no more a part of manufacturing the same than the cutting and preparing of such timber for the saw. In one case the manufactured product of the laborer would be the log; in the other, the manufactured product would be the lumber. We therefore hold that in this case the respondent was entitled to his lien on the lumber."

The Washington statute is, as I understand, practically identical with ours as to the creation of such a lien.

It is well settled in this state that a laborer performing work in assisting in the securing of logs to be manufactured into lumber is entitled to a lien therefor on the lumber after the same is manufactured: *Jones on Liens* (3 ed.), § 703 et seq.; *Fischer v. Cone Lumber Co.*, 49 Or. 277, 283 (89 Pac. 737). The notice of lien therefor may be filed after the logs are sawed. Lien statutes are remedial and should be so construed and enforced so as to carry out the intent of lawmakers: *Day v. Green*, 63 Or. 293 (127 Pac. 772). To require the items of labor on the logs and the work in manufacturing the same into lumber to be segregated would only render it necessary for the court to add the amounts together again and render a decree therefor without protecting or changing the rights of any interested party in the least.

I therefore withhold my assent to that part of the opinion holding a part of the lien void.

Argued September 18, affirmed October 21, rehearing denied December 23, 1919.

OREGON HOME BUILDERS v. MONTGOMERY INV. CO.

(184 Pac. 487.)

Trial—Finding of Facts by Judge Specific as in Special Verdict.

1. Where the parties to an action waive their rights to a jury, the findings of the trial judge are in the nature of a special verdict, and the judge must find the facts as particularly as is required in a special verdict returned by a jury.

Trial—Finding of Facts by Special Verdict.

2. A special verdict must find all the facts essential for a judgment, but ultimate and constitutive, rather than evidentiary, facts should be stated.

Trial—Adequacy of Special Verdict Stating Findings on Issue Determining Case.

3. A special verdict must pass on all the material issues, yet will be adequate if it states sufficient findings on an issue ultimately determining the case and necessarily supporting the judgment rendered so that other issues become immaterial.

Trial—Findings of Judge Being Only Conclusions of Law Insufficient.

4. If the findings made by the trial judge are not in truth findings of fact, but only conclusions of law, the judgment cannot stand because it must be supported by a statement of ultimate facts.

Trial—"Evidentiary Fact" Defined.

5. An "evidentiary fact" is one that furnishes evidence of the existence of some other fact.

Trial—"Ultimate Fact" Defined.

6. An "ultimate fact" is the final resulting effect reached by processes of legal reasoning from the evidentiary facts.

Pleading—Affirmative Allegation in Answer as Denial of Affirmative Allegation in Complaint.

7. In a broker's action for commission on negotiating an exchange of properties, the affirmative allegation in the complaint that the purchaser procured owned his exchanged premises in fee simple, followed by denial in the answer, is sufficient after judgment and without timely objection, for the reason that such denial is the equivalent of an affirmative allegation of nonownership by such purchaser.

Trial—"Fact in Issue" on Which Complaint is Based and Which Defendant Controverts.

8. In a realty broker's action for commission in negotiating an exchange of properties, question of whether or not the purchaser pro-

cured was the owner in fee simple of his lands to be exchanged *held* a "fact in issue," defined as that on which plaintiff proceeds by his action, and which defendant controverts in his pleadings, so that findings thereon were findings of ultimate fact and not mere conclusions of law.

Brokers—"Real Estate Broker" Defined.

9. A "real estate broker" is one employed in negotiating the sale, purchase, or exchange of lands on a commission contingent on success.

Brokers—Right to Commission on Refusal of Principal to Sell.

10. A realty broker, employed to sell given lands or to find a purchaser ready, able and willing to buy, is entitled to commission when he introduces to his principal a person ready, able and willing to purchase on the terms fixed by the principal, even though the latter refuses to sell.

[As to the right of a broker to compensation for sale, lease, etc., defeated by act of the owner, see notes in 2 Ann. Cas. 184; 20 Ann. Cas. 1020.]

Brokers—Construction of Contract to Pay Commission on "Consummation of Deal."

11. In view of a stipulation that plaintiff broker's commission should be so much "of the price," engagement by the owner to pay commission if the broker found a buyer ready and willing to "consummate a deal" for the stipulated price *held* to be to pay commission on actual completion and carrying out of a contract of exchange of properties with a buyer procured by the broker.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This is an action by a real estate broker to recover a commission. The Oregon Home Builders, plaintiff, and the Montgomery Investment Company, defendant, are corporations. The plaintiff is engaged in the business of a real estate broker. The defendant owned a four-story brick building and the land upon which it stood in Portland. On June 1, 1916, the defendant signed a writing which reads as follows:

"To the Oregon Home Builders:

"You are hereby employed and authorized to offer for sale or exchange and given the exclusive sale of the property described in the margin hereof, at the price and terms noted therein or at such other price

and terms as I may hereafter agree to. You are hereby authorized by me to accept a deposit to be applied on the purchase price of said property, and, in my name, to execute and deliver a binding written contract for the sale and conveyance of the said above described property. In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such other terms and price as may be agreed to by me, or place me in touch with a buyer to whom I at any subsequent time sell or convey said property, I hereby agree to pay you in cash, as a commission for your services, the following sums, to-wit: \$750.00 cash of the price for which said property is sold or at which it is exchanged, which said commission I authorize you to retain out of the first money paid on the purchase price of said property as a deposit, or otherwise. I hereby warrant the information given in the margin to be true and that I am in peaceable possession of the said described property, that my title to the same is perfect, and is without encumbrance as stated, and that I will furnish a satisfactory abstract of title brought down to the date of sale, showing such title. In case of an exchange of my said property, I have no objection to your representing and accepting compensation from the other party to the exchange as well as myself. I agree to furnish an abstract of title to the date of sale. I further agree that this contract and the authority hereby conferred shall continue in effect until I give you ten days' notice of withdrawal.

"MONTGOMERY INVESTMENT Co.

"BAYARD T. ALLYN, Pres.

"A. J. DELANO, Treas.

"F. J. DELANO, Secy.

"West half of lots 7 and 8, Block 135, Portland, Multnomah County, Oregon, known as No. 386 Third Street, Portland, Ore., Price \$70,000. Terms, exchange. Present encumbrance: Mortgage \$25,000 at 7%. Are interest charges and all bonded assessments paid to date? Yes. City liens, bonded: None. Character of improvements: 4 story brick store and apartment."

Afterwards the plaintiff introduced to the defendant Claude D. Starr as a prospective purchaser. After "numerous negotiations" between Starr and the defendant, "in all of which said negotiations the plaintiff corporation assisted, associated and participated," the defendant and Starr signed a writing as follows:

"This Agreement, Made and entered into this 1st day of June, 1916, by and between The Montgomery Investment Company, a corporation, by its president and secretary, with the corporate seal, party of the first part, and Claude D. Starr, party of the second part, Witnesseth:

"That for and in consideration of the agreements hereinafter contained, the party of the first part agrees to sell to the party of the second part and the party of the second part agrees to purchase from the first party the following described property in Multnomah County, State of Oregon, to wit: [Here is described the land upon which the brick building is located.]

"Subject to a mortgage for the sum of \$25,000.00, which said mortgage is due November, 1916. Also to convey by bill of sale all the furniture, except personal effects, now in the above named premises, free and clear of all encumbrances.

"And in payment of the purchase price of the above described property, and in consideration of the conveyance thereof, the party of the second part agrees to sell and convey to the party of the first part the following described properties, situated in Multnomah and Clackamas Counties, State of Oregon, to wit: [After describing two lots in Portland, one of which was subject to a mortgage for \$4,500, while the other is said to be clear of encumbrance, the writing described two tracts aggregating 232.72 acres located in Clackamas County.] Same to be clear of all encumbrances.

"And the said party of the second part agrees to pay at the consummation of this transaction the sum of \$5,000 in cash, to the party of the first part.

"All rentals, interest and adjustments to be made as of July 1, 1916. Deeds conveying said properties from one to the other of the parties hereto are to be good and sufficient warranty deeds conveying a fee simple title to the above described properties, free from all encumbrances except as herein mentioned, and said deeds shall be delivered from one to the other of the said parties hereto within a reasonable time. Abstracts of title or certificates of title to be furnished each party to the other to their respective properties, and a reasonable time shall be allowed for the correction of any defects that may appear."

The plaintiff was "the procuring cause of the execution of the agreement" made between the defendant and Starr.

On June 10, 1916, Starr submitted to the defendant abstracts of title covering the two Portland lots and the two Clackamas County tracts. The abstracts

"did not disclose that the said Starr was the owner in fee simple of the property situated in Clackamas County * * and did not disclose that said Starr had a marketable title thereto." In truth Starr "was not at any time prior to the commencement of this action the owner in fee simple of the real property known as the Clackamas County lands, and did not have a marketable title thereto but his title therein was defective."

On July 20, 1916, the defendant delivered to Starr a complete statement of its objections

"pointing out the defects to the title of said Clackamas County lands as shown by said abstract of title," and "refused to consummate said deal unless the defects so pointed out should be remedied within a reasonable time and on or before the 3d day of September, 1916."

Starr failed to correct the defects pointed out to him and he

"did not prior to the 3d day of September, 1916, or at all, tender to the defendant an abstract of title show-

ing that said defects or any of them had been remedied, or showing that the said Starr had or could convey a marketable title to said Clackamas County lands." On September 3, 1916, the defendant notified Starr "that on account of his failure and refusal to comply with said contract the defendant considered itself no longer bound thereby."

Starr had caused the written agreement which he and the defendant had signed to be recorded; and in February, 1917, he delivered to the defendant a quitclaim deed to the brick building. Up to and including the time when the quitclaim deed was delivered—

"Starr was not able to convey a fee simple or marketable title to said Clackamas County lands to the defendant, and neglected within a reasonable time after the defects to the title were pointed out to him by the defendant to cure said defects or any of them."

Starr was ready and willing at all times, however, to pay the defendant the \$5,000 stipulated in the contract.

The plaintiff brought this action to recover \$750, alleging that it had earned and was entitled to that sum as a commission under the terms of its contract with the defendant. The facts narrated in the foregoing statement are taken from the findings of fact made by the trial judge, who with the consent of the parties heard the cause without the aid of a jury. The judgment was for the defendant and the plaintiff appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. B. Shively*.

For respondent there was a brief over the names of *Mr. E. V. Littlefield* and *Messrs. Winter, Reams & Maguire*, with an oral argument by *Mr. Robert F. Maguire*.

HARRIS, J.—1-4. The plaintiff contends that the findings labeled "findings of fact," so far as they relate to Starr's title to and ownership in the Clackamas County lands, are no more than conclusions of law; and that therefore they are insufficient to support the judgment. Where the parties to an action at law waive their right to a jury, the findings made by the trial judge who hears and decides the cause are in the nature of a special verdict; and hence since the standard fixed for a special verdict is also taken as the standard for the "findings of fact," the trial judge must find the facts with the same degree of particularity as is required in a special verdict returned by a jury. A special verdict must find all the facts essential for a judgment; but ultimate and constitutive rather than evidentiary facts should be stated. Generally a special verdict must pass upon all the material issues; and yet a special verdict will be adequate if it states sufficient findings on an issue which ultimately determines the case and necessarily supports the judgment rendered so that other issues in the controversy become immaterial: *Turner v. Cyrus*, 91 Or. 462 (179 Pac. 279). If the findings made by the trial judge are not in truth findings of fact but in effect are only conclusions of law, then the judgment cannot stand because it must be supported by a statement of ultimate facts: 38 Cyc. 1979.

5, 6. An "evidentiary fact" is one that furnishes evidence of the existence of some other fact: 17 Cyc. 822. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts: 21 R. C. L. 438. In 8 Words and Phrases, 7144, it is said:

"Ultimate facts are, when considered with reference to the facts or evidence by which they are established

or proved, but the logical results of the proofs, or, in other words, mere conclusions of fact."

It is sometimes difficult to distinguish between conclusions of fact and conclusions of law, because it may be that a statement of fact cannot be made without including a conclusion or it may be that a conclusion of law is such that, in the attending circumstances, it must be stated in the form of a statement of fact: 38 Cyc. 1979; *Levins v. Rovegno*, 71 Cal. 273 (12 Pac. 161); *Clark v. Chicago etc. R. Co.*, 28 Minn. 69 (9 N. W. 75).

"The line of demarcation" as stated in *Levins v. Rovegno*, 71 Cal. 273, 275 (12 Pac. 161, 162), "between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given are drawn without further evidence. This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law, by a process of artificial reasoning; but this last process is often in such exact accord with natural reason that the distinction is scarcely appreciable.

"If ultimate facts were found only from direct evidence to the very fact, the distinction between them and conclusions of law would be easily drawn; but, as they are to a great extent presumed from the existence of other facts, they are conclusions reached by argument, by reason,—are results deduced from an inferential process, in which the evidentiary facts become the premises, and the ultimate fact the conclusion; and this process, by which ultimate facts or presumptions of fact are reached, differs from presumptions of law only in this, that the latter 'are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong'; the former being

'merely natural presumptions, are derived wholly and directly from the circumstances of the particular case, by the common experience of mankind, without aid or control of any rule of law whatever.' "

Although it may not be possible to frame a formula which, in all cases, will serve as an unfailing test by which to determine whether a given deduction states an ultimate fact or a conclusion of law still,

"it is, in many cases," as said in *Levins v. Rovegno*, "the means by which the result is to be reached which must determine whether a given conclusion is one of fact or law. If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law": See, also, *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371 (111 N. W. 527).

In addition to the difficulty encountered in distinguishing between conclusions of law and ultimate facts it is also sometimes difficult to distinguish between inferential facts and ultimate facts; and because of this latter difficulty it has been suggested in one jurisdiction that in cases of doubt the only safe plan is to include all the facts in a special verdict on the theory that if it turns out that a given fact is only evidentiary no harm is done, but if such fact is ultimate, its presence is proper and its absence might be fatal: *Louisville etc. Ry. Co. v. Miller*, 141 Ind. 533, 549 (37 N. E. 343); *Republic Iron Steel Co. v. Jones*, 32 Ind. App. 189, 191 (69 N. E. 191).

It has been said that a fact in issue "is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings": *Garwood v. Garwood*, 29 Cal. 514; *Glenn v. Savage*, 14 Or. 567,

574 (13 Pac. 442); *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675).

We now turn to the pleadings to ascertain what were the facts in issue. The complaint avers that the defendant owned the property upon which the brick building is located and that the plaintiff and defendant entered into an agreement under the terms of which the defendant agreed to pay plaintiff \$750; that the plaintiff found a buyer "ready and willing to consummate an exchange thereof for other property upon such terms, conditions and for such price as should be agreed to by the defendant." It is next alleged in the complaint that the plaintiff produced Claude D. Starr and that Starr and the defendant entered into a contract for the exchange of their respective properties, and that under the terms of the contract the Clackamas County lands were

"to be clear of all encumbrances. That in and by said contract it is further provided that the said Starr should pay defendant the further sum of \$5,000 in cash, and said contract further provided that all rentals, interest and adjustments were to be made as of July 1st, 1916; that deeds conveying said properties from one to the other of said parties were to be good and sufficient warranty deeds conveying a fee simple title to the property conveyed free from all encumbrances except as in said contract mentioned, and that said deeds should be delivered from one to the other of said parties within a reasonable time, and said contract further provided that abstracts or certificates of title were to be furnished by each party to the transaction to the other, covering their respective properties, and that a reasonable time should be allowed each party for the correction of any defects that might appear."

The complaint continues by alleging in paragraph IV:

“That at all times herein mentioned the said Claude D. Starr has been and is now the owner in fee simple of the properties described in paragraph III hereof agreed by him to be conveyed to the defendant, and the said Claude D. Starr has been at all times herein mentioned and is now ready and willing to convey said property and all thereof, subject only to the encumbrances in said contract mentioned, by good and sufficient warranty deed, as provided in said contract, and has been at all of said times, and is now ready and willing to pay defendant said sum of \$5,000 in cash, and at all times herein mentioned and is now ready and willing to consummate said transaction for the exchange of said properties in accordance with the terms of said contract.”

The answer admits that the terms of the contract between the plaintiff and Starr are as alleged in the complaint. The answer admits that Starr is willing to pay \$5,000 but denies every other allegation in paragraph IV. In other words, the plaintiff says that Starr “has been and is now the owner in fee simple” of the Clackamas County lands, which according to the terms of the contract were to be “clear of all encumbrances”; but the defendant denies that Starr has been or is now the owner in fee simple of these lands.

The answer contains some affirmative matter. In substance the defendant says in its answer that Starr submitted abstracts but that they disclosed that he “did not have a merchantable title to any of the real property in Clackamas County”; that on July 19, 1916, the defendant gave to Starr a complete statement of its objections to the title to the Clackamas County lands; that Starr made no attempt

“to correct any of objections made to the title as shown by the abstract which was submitted to this defendant, and that this defendant has never at any time or at all been given or tendered an abstract to the title

showing a merchantable title to the lands in Clackamas County, Oregon."

The answer concluded by averring that on account of the failure of Starr to submit an abstract within a reasonable time "showing a fee-simple title to" the Clackamas County lands, the defendant notified Starr on September 6, 1916, that the contract was canceled "on account of his inability to deliver to this defendant a merchantable title to the property in Clackamas County."

7, 8. All this affirmative matter in the answer was denied by the reply. In other words, the defendant says, but the plaintiff denies, that the abstracts submitted by Starr disclosed that he did not have a merchantable title; and that Starr failed to furnish an abstract showing that he owned the Clackamas County lands in fee simple. It is true that the defendant did not directly allege in its answer that Starr was not the fee-simple owner of the Clackamas County lands; but it is also true that the complaint alleged that Starr was the fee-simple owner of the premises and this allegation of the complaint was denied by the answer, thus forming an issue upon the question as to whether Starr owned the Clackamas County lands in fee simple. It will be observed, too, there are numerous averments in the answer about the abstracts not disclosing a marketable title or fee-simple ownership. It may be assumed, without deciding, that in order to prevail the defendant must aver that Starr was not the fee-simple owner of the premises; and yet, notwithstanding such assumption, the answer must be held sufficient after judgment and in the absence of a timely objection, for the reason that the affirmative allegation in the complaint that Starr owned the premises in fee simple followed by the

denial in the answer is taken as the equivalent of an affirmative allegation in the answer of nonownership: 31 Cyc. 716; *Treadgold v. Williams*, 81 Or. 658, 663 (160 Pac. 803); *Hodson-Feenaughty Co. v. Coast Culvert & Flume Co.*, 91 Or. 630 (178 Pac. 382, 387). The question of whether or not Starr was the owner in fee simple of the Clackamas County lands was a "fact in issue" within the definition already given of "a fact in issue," for the Montgomery Investment Company defends, in part at least, upon the circumstance that Starr did not own these lands in fee simple. If the fact that Starr was not the fee-simple owner of the premises is, together with the other facts recited in the findings, sufficient to defeat the claim of plaintiff, then the statement of that fact, together with the other recited facts, is enough to support the judgment.

Ownership may be pleaded as an ultimate fact and *a fortiori* ownership may be stated as an ultimate fact in a special verdict or in the findings of fact made by a trial judge. Whether a finding of ownership is a finding of fact or a conclusion of law may of course depend upon the issues to be tried. We think that the findings about the ownership of the Clackamas County lands are findings of an ultimate fact. The trial court intended that the finding about ownership should serve as a finding of fact. This intention is made clear by the circumstance that this finding appears among the findings of fact and the additional circumstance that there is an appropriate finding of nonownership among the conclusions of law. The record presented to us does not contain any evidence, if any there was, taken at the trial; but the controversy is presented upon the pleadings and the findings made by the trial judge. The record does not disclose any request made by the plaintiff for more detailed findings about the question

of ownership. Moreover, it is stated in the printed brief filed by the defendant that

“the findings of fact * * were agreed to by plaintiff and its counsel to the effect that Starr did not have a marketable, fee-simple title to the Clackamas County lands.”

The following precedents support the holding that a finding of ownership may be the finding of an ultimate fact: *Curtis v. Boquillas Land etc. Co.*, 9 Ariz. 62 (76 Pac. 612), 8 Ariz. 258 (71 Pac. 924); affirmed in 200 U. S. 96 (50 L. Ed. 388, 26 Sup. Ct. Rep. 192, see, also, Rose's U. S. Notes); *Savings & L. Soc. v. Burnett*, 106 Cal. App. 106 (93 Pac. 900); *Levins v. Rovegno*, 71 Cal. 273 (12 Pac. 161); *Ybarra v. Sylvany*, 3 Cal. Unrep. Cas. 749 (31 Pac. 1114); *Travelers Ins. Co. v. Hallauer*, 131 Wis. 371 (111 N. W. 527).

9, 10. Stated in general terms, a real estate broker is one employed in negotiating the sale, purchase or exchange of lands on a commission contingent on success: 9 C. J. 510; 4 R. C. L. 242; *Rodman v. Manning*, 53 Or. 336 (99 Pac. 657, 1135, 20 L. R. A. (N. S.) 1158). The broker is not entitled to a commission unless he accomplishes what he was employed to do: 9 C. J. 588. Although every agreement is of course governed by its own language, yet if the contract states in general terms that the broker is employed to sell given lands or is employed to find a purchaser who is ready, able and willing to buy, he performs his duty and is entitled to a commission when he introduces to his employer a person who is ready, able and willing to purchase upon the terms fixed by the employer, even though the latter refuses to sell: *York v. Nash*, 42 Or. 321, 330 (71 Pac. 59). In this class of cases the broker has done all that he has agreed to do, while the employer simply declines to avail himself of what the broker has done in pursu-

ance of his employment. The fact that the broker introduces a customer who is ready, able and willing to purchase on the terms offered by the employer entitles the broker to payment of the stipulated commission.

There is another class of cases where the broker brings about the execution of a contract between his employer and a third person for the sale or exchange of lands. The courts are practically unanimous in holding that a broker employed to sell or exchange lands earns his commission, unless the contract of employment contains a stipulation to the contrary, when a customer and the employer enter into a valid and binding contract for the sale and exchange of lands. In a few jurisdictions the introduction of a customer by the broker is an implied representation by the broker that the customer is able to carry out the contract to buy or exchange; and hence in those few jurisdictions if a contract is made between an employer and customer and is not completed on account of the inability of the customer to buy or exchange, the broker cannot recover any compensation: *Butler v. Baker*, 17 R. I. 582 (23 Atl. 1019, 33 Am. St. Rep. 897); *Riggs v. Turnbull*, 105 Md. 135 (66 Atl. 13, 11 Ann. Cas. 783, 8 L. R. A. (N. S.) 824), but the literally overwhelming weight of authority is that, unless the employer and broker have stipulated to the contrary, the broker has fully earned his commission when the customer and employer enter into a valid and binding contract for the sale or exchange of lands and the broker's right to recover a commission is not, in the absence of bad faith upon his part, defeated or even affected by the fact that it subsequently develops that the customer is unable to complete his contract to buy on account of financial inability or is unable to complete the contract to exchange on account of inability to transfer a merchantable title. When a broker

employed to sell or exchange lands presents a customer, there are, as stated in *Roche v. Smith*, 176 Mass. 595 (58 N. E. 152, 79 Am. St. Rep. 345, 51 L. R. A. 510), three courses open to the employer:

"1. He may examine the title of the customer, and accept him or not accept him on learning the result of the examination; 2. He may enter into a contract with him, in which it is provided that his title shall be examined, and if it turns out that his title is not good the contract is at an end; or 3. He may enter into a binding contract with him for the conveyance of the land."

If the employer takes the third course, he in effect says to the broker:

"I accept the customer as a person ready, able and willing to purchase or exchange lands, as the case may be; you have done what you agreed to do; I have accepted the services rendered by you; and you have earned your commission."

The employer has a reasonable opportunity to investigate the ability of the customer to perform and when, without fraud or misrepresentation on the part of the broker, the employer accepts the customer by effecting a valid and binding contract with him, it is equivalent to a determination that the customer is a person ready, able and willing to purchase or exchange and the employer is estopped thereafter to deny the ability or willingness of the customer to complete the contract: *Stewart v. Will*, 65 Or. 138, 140 (131 Pac. 1027); *Roche v. Smith*, 176 Mass. 595 (58 N. E. 162, 79 Am. St. Rep. 345, 51 L. R. A. 510); *Francis v. Baker*, 45 Minn. 83 (47 N. W. 452); *Fox v. Ryan*, 240 Ill. 391 (88 N. E. 974); *Moore v. Irvin*, 89 Ark. 289 (116 S. W. 662, 131 Am. St. Rep. 97, 20 L. R. A. (N. S.) 1168); *Hutton v. Stewart*, 90 Kan. 602 (135 Pac. 681); *Seabury v. Fidelity Ins. etc. Co.*, 205 Pa. St. 234 (54 Atl. 898); *Lombard*

v. *Sills*, 170 Mo. App. 555 (157 S. W. 93); *Payne v. Ponder*, 139 Ga. 283 (77 S. E. 32); *Keinath & Co. v. Reed*, 18 N. M. 358 (137 Pac. 841); 9 C. J. 631, 652; 4 R. C. L. 305, 309-311. There are cases holding that where the contract is one for the exchange of lands and its noncompletion is due to the inability of the customer to transfer a merchantable title, the broker is not entitled to a commission, because, it is argued, the employer cannot enforce a specific performance of the contract and thus secure what it was agreed he should have: *Conner v. Riggins*, 21 Cal. App. 756 (132 Pac. 849). See *Griffith v. Bradford* (Tex. Civ. App.), 138 S. W. 1072. The writer takes the view that it is illogical to hold in the one case that the broker has completely performed his duty and is entitled to his commission when the employer and customer execute a valid and binding contract, on the theory that by making the contract the employer accepts the customer as a person ready, able and willing to purchase or exchange, and to hold in the other case that the right of the broker to a commission is defeated if it afterwards appears that the customer is unable to carry out his written agreement and convey a merchantable title. If the contract is valid and binding, the employer has his remedy in damages. The fact that the customer does not have a complete title may prevent specific performance, and yet the employer is not without a remedy; and it must be remembered that the right to damages resulted from the services rendered by the broker. However, we wish now to direct attention to the contract of employment entered into between the plaintiff and defendant, for if it appears from an examination of the language of that instrument that the parties intended to make the plaintiff's right to a commission depend upon a completion of the transaction which he was em-

ployed to negotiate, then it will be unnecessary to decide whether the contract between the customer and employer for the exchange of their lands must in truth and in fact be capable of specific performance before it can be said that the broker is entitled to a commission where his contract of employment merely states in general terms that he is to find a purchaser or is to sell or exchange the employer's land.

11. The parties differ radically in their construction of the language used by them in their contract. Referring to the writing signed by the defendant and in which it agrees to pay a commission to the plaintiff, it will be observed that the instrument contains the following language:

"In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such other terms and price as may be agreed to by me."

The defendant contends that the words "consummate a deal" refer to a completed transfer and that they do not refer to a contract for a sale or exchange; while the plaintiff insists that to make a binding contract for an exchange is to "consummate a deal" within the meaning of these words. There are many cases holding that a contract for a sale is "the consummation of a sale", within the meaning of a broker's contract which provides for the payment of a commission upon "the consummation of a sale": *Ormsby v. Graham*, 123 Iowa, 202, 214 (98 N. W. 724); *Micks v. Stevenson*, 23 Ind. App. 475 (51 N. E. 492); *Wolverton v. Tuttle*, 51 Or. 501, 508 (94 Pac. 961); *Shaniwald v. Cady*, 92 Cal. 83 (28 Pac. 101); *Clark v. Battaglia*, 47 Pa. Sup. Ct. 290; *Purcell v. Firth* (Cal.), 167 Pac. 379; *Turner v. Watkins*, 36 Cal. App. 503 (172 Pac. 620); *Rice v. Mayo*, 107

Mass. 550; *Sheperd-Teague Co. v. Hermann*, 12 Cal. App. 394 (107 Pac. 622). On the other hand, there are precedents fully supporting the position of the defendant and holding that "to consummate a deal" means to complete the transfer: *Goodwin v. Siemen*, 106 Minn. 368 (118 N. W. 1008); *Conner v. Riggins*, 21 Cal. App. 756 (132 Pac. 849). See, also, *Nutting & Co. v. Kennedy*, 16 Ga. App. 569 (85 S. E. 767); *Morse v. Conley*, 83 N. J. L. 416 (85 Atl. 196); *Flower v. Davidson*, 44 Minn. 46 (46 N. W. 308); *Gaut v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020; *Ball v. Davenport*, 170 Iowa, 33, 40 (152 N. W. 72). The conclusions reached in other adjudications are not as helpful as might be wished; for, after all the words "consummate a deal" may have one meaning under one set of circumstances and a different meaning under other circumstances: *Flower v. Davidson*, 44 Minn. 46, 48 (46 N. W. 308).

According to the rule found in Section 718, L. O. L., "The terms of a writing are presumed to have been used in their primary and general acceptance." The word "deal" has been defined as "an arrangement to attain a desired result by a combination of interested parties": *Reynolds v. Pray*, 148 Iowa, 213, 215 (127 N. W. 50); *Ball v. Davenport*, 170 Iowa, 33, 40 (152 N. W. 72); *Gaut v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020, 1021. According to Webster's International Dictionary, the word "deal" when used to express an "arrangement to attain a desired result" means "a secret arrangement, as in business or political bargains." The same dictionary defines the word "deal" as "an act of buying and selling; a bargain." The primary meaning of the term "consummate" is: "to bring to completion; to raise to the highest point or degree; to complete; finish."

A further examination of the language of the contract of employment will disclose that the defendant agreed to pay—

“In cash as a commission for your services the following sums, to wit: \$750 cash of the price for which said property is sold or at which it is exchanged, which said commission I authorize you to retain out of the first money paid on the purchase price of said property as a deposit or otherwise.”

If there had been a sale for cash payable in installments or otherwise, then the commission to be paid would be “\$750 cash of the price.” In other words, the commission would be paid out of the price. In *Ormsby v. Graham*, 123 Iowa, 202, 215 (98 N. W. 724), the employer agreed to execute and deliver a deed, through the broker, “when the said land is sold,” and to allow him the stipulated “commission, to be retained in full out of the cash payment,” or, if the payment did not pass through the broker’s hands, then the employer was to pay the commission directly, and it was there held:

“That a completed sale as a basis for recovery of commissions was contemplated by the parties is shown in the stipulation, which authorized the agent to retain his compensation from the first cash installment of the price for which the property might be sold.”

As has already been said, the general rule is that a broker employed under a contract to sell or exchange lands is, in the absence of a stipulation to the contrary, entitled to his commission immediately upon the execution of a valid and binding contract between the employer and customer; but in the contract presented to us we find that the parties have in at least one instance provided “to the contrary,” for if a contract of sale had been made with the price payable in installments or

otherwise instead of a contract for an exchange, the commission would be "\$750 of the price" with authority given to the broker to retain the commission out of the first payment made on the price. When the contract of employment is construed as a whole, and especially when it is read in the light of the stipulation which in effect postpones the payment of the commission to such time as enough of the price is paid to satisfy the commission in the event of a contract of sale, we think that "to consummate a deal" should be interpreted, in the contract presented here, to mean the completion and carrying out of the contract of exchange by an actual transfer of the properties. Neither party charges the other with bad faith and consequently it is not necessary to discuss any questions which might be raised if the defendant had been guilty of bad faith.

The judgment is therefore affirmed. **AFFIRMED.**

BENSON, JOHNS and BENNETT, JJ., concur.

Argued at Pendleton October 27, affirmed November 25, rehearing denied December 23, 1919.

CRANSTON v. CALIFORNIA INS. CO.

(185 Pac. 292.)

Pleading—Construction of Contract Set Out in Complaint.

1. Where plaintiff pleads a conclusion of fact as to the nature of the contract set out in the complaint, it is the duty of the court to consider the language of the instrument itself and give it the proper legal construction.

Insurance—Personal Contract by Broker to Procure Insurance.

2. A letter, signed by a firm of insurance brokers, stating that, 'pending receipt of our covering notes, this will serve to protect you against loss * * from fire' on certain property, "coverings being in"

defendant company, did not bind defendant, since on its face it did not amount to anything except the personal promise of the brokers to procure from defendant certain insurance for plaintiffs.

Insurance—Existing Law as Part of Contract.

3. Under the presumption of Section 799, subdivision 34, L. O. L., "that the law has been obeyed," where insurance company's "covering note" provided that the insurance was subject to all the conditions of a certain kind of policy used by insurer, it must be presumed that the policy contained the provisions enjoined by the standard policy law (Laws 1911, p. 279), such as provision as to forfeiture on change in insured's interest, title, or possession.

Insurance—Automobile Fire Insurance—Change of Ownership Defense.

4. Where insured automobile dealer sold and delivered an insured car to one who drove it to another state without the knowledge or consent of the insurer, and it was there destroyed by fire, the insurer was not liable for the loss, under provision forfeiting for change of interest, title or possession.

[As to the validity and construction of automobile insurance policies, see notes in Ann. Cas. 1915A, 627; Ann. Cas. 1917D, 53.]

Insurance—Contract by Brokers Without Authority to Act for Insurer.

5. Where insurance brokers had never before acted as agents for defendant insurance company, and did not represent to plaintiffs, insured, that they had any authority to act for or on behalf of defendant, and the instrument, alleged to bind defendant, wherein brokers promised to insure automobiles, does not purport to represent such authority as against the defendant, the case is not one of an undisclosed principal to be proceeded against upon discovery of identity.

Insurance—Proposal to Take Insurance and Counter Offer.

6. Where insurance brokers sent to defendant insurance company a copy of their letter to plaintiff, which merely stated they would protect plaintiff from fire loss pending receipt of their covering notes, the company, never having had any connection with the brokers, was justified in treating it as a proposal to take insurance, and since, in view of the requirements of the standard policy law (Laws 1911, p. 279), it could not be presumed that defendant violated the law and assented to the copy of a letter as an insurance contract, a policy and covering notes which it sent in reply amounted simply to a counter proposition, which would not give rise to a contract, unless accepted.

Insurance—Mere Payment of Premium Does not Create Insurance Contract.

7. Where insurer's counter offer, embodied in the policy and covering notes it sent to brokers applying for insurance for plaintiff, was not accepted by plaintiff, plaintiff's payment of premium would confer no rights, except the right to recover the payment as for money had and received.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

The defendant is a California insurance corporation. After reciting this fact the complaint proceeds, as follows:

"That heretofore and on or about the 23d day of June, 1916, in consideration of the premium then paid and for value received, the above named defendant duly and regularly made, executed and delivered to plaintiffs their certain certificate of insurance in words and figures following, to wit:

" 'HUGHES & COMPANY,

" 'Real Estate and Insurance Agents.

" 'Baker, Oregon, June 23, 1916.

" 'Messrs. Cranston & Masters,

" 'Baker, Oregon.

" 'Gentlemen:

" 'Pending receipt of our covering notes this will serve to protect you against loss or damage resulting from fire or theft on the following cars in the amount indicated from noon of this date, said coverings being in the California Fire Insurance Company, viz.:

" 'Studebaker Six 17 Series No. 645718, \$970.00, rate 1.25.

" 'Thanking you for the favor of this business and soliciting your further commands, we beg to remain,

" 'Very truly yours,

" '(Signed) HUGHES & Co.'

"And promised and agreed to indemnify plaintiffs against loss by fire in the said sum of \$970.00, and that no covering notes as aforesaid were ever issued to or received by plaintiffs or either of them, and that when said insurance was issued and when said loss by fire occurred the plaintiffs were the owners of said automobile which was of the value of \$1,200.00."

The primary pleadings of the plaintiffs concludes with the statement that the automobile in question was destroyed by fire about September 6, 1916, of which

fact the plaintiffs notified the defendant and presented proof of loss, but the defendant refused to pay them therefor.

The answer traverses the whole complaint except the allegation about the corporate character of the defendant. It affirmatively alleges the defendant's version of the transaction, to the effect that at the time mentioned in the complaint the plaintiffs applied to Hughes & Company for insurance; that the latter executed the instrument quoted in the complaint, without any authority whatever from the defendant to do so; that Hughes & Company delivered the instrument to the plaintiffs as a temporary device to serve only until the proper forms could be obtained from the defendant covering the insurance on the car in question in what is known as a dealer's policy or a "floater" policy, to be evidenced in part by what are known as covering notes; that the defendant issued such documents and placed them in the hands of Hughes & Company for delivery to the plaintiffs; but that although the plaintiffs well knew the documents issued by the defendant were in possession of Hughes & Company ready for delivery, they waived delivery of the same. The answer further sets up the provisions of the policy in part as prescribed in the standard policy law of this state, and avers matter showing a breach of the contract by the plaintiffs, in that they had sold the car and placed it in the actual and exclusive possession of the purchaser, all without the knowledge or consent of the defendant.

This matter is denied by the reply, and other allegations are made by way of estoppel. At the close of the testimony for the plaintiffs the court sustained a motion for a judgment of involuntary nonsuit and the plaintiffs appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. O. B. Mount*.

For respondent there was a brief over the names of *Mr. William Smith* and *Mr. J. J. Heilner*, with an oral argument by *Mr. Smith*.

BURNETT, J.—1. As stated, the instrument upon which the plaintiffs rely is set out at large in the complaint. It is true, the pleading says that the defendant made this instrument and thereby promised and agreed to indemnify the plaintiffs against loss by fire, etc. In *Somers v. Hanson*, 78 Or. 429 (153 Pac. 43), Mr. Chief Justice MOORE declared the law of such a pleading in these words:

“When the contract sued upon is set out *in haec verba*, it will be so construed that its legal effect will be recognized. If the writing is thus declared upon, it is superfluous to state what its legal effect is: 4 Ency. Pl. & Pr. 918. If there be any discrepancy between the averments of a pleading and the terms of a writing properly identified or attached to a statement of facts constituting a cause of action or a defense, the language of the exhibit will control in determining its legal effect: 31 Cyc. 563; *Patrick v. Colorado Smelting Co.*, 20 Colo. 268 (38 Pac. 236); *Lewy v. Wilkinson*, 135 La. 105, 64 South. 1003). The promissory note having, in effect, been set forth in the complaint in the exact language employed in the negotiable instrument, the allegation of the legal effect of the writing as stated in the pleading must be disregarded as superfluous and variant.”

2. Taking, then, the language of the instrument itself, it is the duty of the court as a matter of law to give it the proper legal construction. The wording of this document contains nothing binding upon the defendant. It is purely the statement of Hughes &

Company. The complaint seems to be drawn upon the theory that Hughes & Company was the agent of the defendant.

“A contract by an agent should be in the name of his principal, so as to show beyond question that it is the principal who contracts, and not the agent, since the intention of the parties, as legally evidenced by the terms of the contract itself, is always the governing consideration in determining who is bound by the contract. It is not alone sufficient that the agent has authority to bind the principal, but he must in fact make the contract the obligation of the principal in terms, in order to bind him. No particular form of words is necessary for this purpose; the material thing is that it appear on the face of the instrument that it is the principal who makes the grant or incurs the obligation, which induces the contract to be made by the other party”: 2 C. J. 670.

“Generally the agent and not the principal is personally bound by a contract containing apt words to bind him, if he executes the contract in his own name and makes the promises and undertakings his own without any suggestion or indication that he is contracting for another, although he recites that he is an agent or the other party knows that he is such, and the agent also will be liable when he so executes the contract as in terms to bind both himself and the principal; and it has been held that where the contract is signed by the agent with an affix indicating his agency and principal, and the consideration moves to the principal, both may be held liable”: 2 C. J. 682.

On its face the instrument pleaded does not amount to anything except the personal promise of Hughes & Company. It indicates nothing more than that Hughes & Company promises as an insurance broker to procure from the defendant certain insurance in favor of the plaintiffs; containing no language which is binding upon the defendant, it cannot be given a legal effect to charge the company. In view of the

doctrine announced by Mr. Chief Justice MOORE in *Somers v. Hanson*, 78 Or. 429 (153 Pac. 43), the complaint does not state facts sufficient to constitute a cause of action against the defendant.

3, 4. On the evidence as disclosed by the record the plaintiffs are not in any better plight. Their narration of the history of the document upon which they rely is substantially as follows: They were dealers in automobiles at the time in question. Having received a new stock of six machines, they telephoned to a woman employee in the office of Hughes & Company, saying they wished some insurance on these cars. She went to their place of business and with the assistance of one of the firm took the numbers of the machines and returned to her office, where she wrote out and mailed to the plaintiffs the instrument in question. Afterwards, without the knowledge or consent of the company directly or through any agency so far as the evidence discloses, the plaintiffs parted with possession of the automobile, delivering it to George Duncan under a contract for its purchase by the latter, who drove it into Nevada, where it was destroyed by fire. This of itself would defeat plaintiffs' recovery, because it would constitute a breach of the required provisions mentioned in the standard policy law making the "entire policy void unless otherwise provided by agreement indorsed hereon or added hereto * * if any change, other than by death of an insured, take place in the interest, title or possession of the subject of insurance": Laws 1911, Chap. 175. The "covering note," so called, which the defendant issued in connection with the policy, is in evidence and contains this provision:

"It being understood and agreed that this insurance is subject to all the terms and conditions of the

automobile floater policy now in use by the California Insurance Company covering fire, theft and transportation."

We must assume "that the law has been obeyed" (Section 779, subdivision 34, L. O. L.), and hence that the policy contains the provisions enjoined by the standard policy law. This being true, the fact that the car was burned while out of the possession of the plaintiffs without the knowledge or consent of the company justifies the judgment of nonsuit.

5. Hughes & Company had never acted as the agent of the defendant company in any transaction up to the execution of the instrument quoted in the complaint and had never had any business with the defendant. The evidence is clear and explicit on that point. There is no testimony even that Hughes & Company represented to the plaintiffs that it had any authority to act for or on behalf of the defendant and, as we have seen, the instrument in question does not purport to represent any such authority as against the defendant. Hence, this is not a case of undisclosed principal. It is true that if in fact there is an agency and it is concealed, anyone dealing with the agent may, upon discovering the principal, proceed against the latter and not against the agent: *Kayton v. Barnett*, 116 N. Y. 625 (23 N. E. 24). But, as said in 2 C. J. 842:

"The converse of the above rule is also true. Accordingly, it is the rule that, in the absence of estoppel or ratification, an undisclosed principal is not liable on the contracts of one assuming without authority to act for him, or on contracts made by his agent in excess of his authority or not in the course of his employment."

It is also said in 2 C. J. 562:

"It follows from the above rules that as a general rule every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal, particularly where he is dealing with an agent whose authority he knows to be special, or where it is his first transaction with the agent, or the circumstances connected with the agency are such as should put him on inquiry, as where it appears from the circumstances of the particular business that the interests of the agent and principal are necessarily adverse, or that the authority is of an unusual, improbable, or extraordinary nature. Such a person is to be regarded as dealing with the power before him, and must, at his peril, observe that the act done by the agent is legally identical with the act authorized by the power."

This text is supported by some hundreds of authorities cited in the note. Our own decisions inculcate the same doctrine: *Reid v. Alaska Packing Co.*, 47 Or. 215 (83 Pac. 139); *Baker v. Seaward*, 63 Or. 350 (127 Pac. 961); *Roberts v. Lombard*, 78 Or. 100 (152 Pac. 499); *Bessler v. Derby*, 80 Or. 513 (157 Pac. 791).

6. The only individual with whom the plaintiffs dealt in securing the instrument upon which they sued was the employee of Hughes & Company. She was called by the plaintiffs as their own witness. After having narrated that she had heard of the loss by fire and stating that she knew about when the policy of insurance was written, she was asked this question:

"How did the company get the information with reference to the fact that the policy of insurance was written for Cranston & Masters as therein stated?"

And replied:

"Why, through the sending of the copy, as I remember sending a copy of this first white slip that we had

there, I sent that to their general agent in Portland. I sent them the information, the numbers; I don't remember whether it was a copy of this letter. I wrote and told them and gave them these numbers and he forwarded them to Frisco, and then they sent the covering notes back."

Speaking of the instrument upon which the plaintiffs rely, she said she did not know where the copy of it could be, that she had not destroyed it. She further said:

"I am not responsible for anything after I put it away, and whether there was a copy of that made I don't remember. I had the numbers of the cars, and I sent the numbers; and I don't remember whether I sent a copy or not to the company."

She testified that no agent of the company had anything to do with making out the plaintiffs' instrument. Be that as it may, and conceding for the sake of argument that Hughes & Company sent a copy of the instrument quoted in the complaint to the defendant; yet, not having hitherto had any connection with Hughes & Company, the defendant had a right to treat it as a proposal to take insurance, and the testimony on behalf of the plaintiffs shows that the defendant in response to this offer sent back to Hughes & Company a policy and covering notes insuring the automobile.

The act of February 23, 1911, popularly known as part of the standard policy law of this state, provides that after September 1, 1911, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use, any fire insurance policy or renewal of any fire insurance policy on property in this state, except such as shall conform to the conditions named in the act, which

shall be contained on the second page of the policies and which shall form a portion of the contract between insurer and the insured. The conditions required are then set forth at large in the act. We cannot presume that the defendant company deliberately violated the law and assented to the instrument upon which the plaintiffs rely. The undisputed fact that it sent to Hughes & Company a policy and covering notes amounts simply to a counter proposition in answer to the offer embodied in the plaintiffs' instrument. At any rate, the evidence is conclusive in legal effect that the minds of the parties never met on the terms of a contract of insurance. It is true, as appears in evidence, that some time after the instrument described in the complaint was drawn as there appears, the defendant appointed Hughes & Company its agent at Baker, but that was a subsequent transaction and did not include what had been previously done by Hughes & Company at the instance of the plaintiffs.

7. The evidence is quite vague about the payment of any premium. No amount paid is stated anywhere in the testimony. The plaintiff Masters, testifying on behalf of the plaintiffs, was asked this question:

"Did you pay any premiums of insurance to Hughes & Company on this instrument which is marked Plaintiffs' Exhibit '1'?" (referring to the instrument quoted in the complaint).

He answered:

"We always paid our insurance bill the first of every month. They generally sent us the bill, and it was paid the first of every month or about that time."

The plaintiff Cranston testified as follows:

"Q. From what time did you pay premiums upon these cars under plaintiffs' Exhibit '1' [meaning the instrument set out in the complaint]?"

"A. I don't know the definite dates.

"Q. From what time did you pay?"

"A. From June 23, 1916."

Payment to Hughes & Company on the contract pleaded would not be payment to the defendant, for it is the contract of Hughes & Company, and not that of the defendant. M. S. Hughes, who, it seems, was the sole member of the firm of Hughes & Company, testified that both before and after the loss a Miss Thompson was in his employ and collected premiums for him in his insurance business, depositing them in the bank to the credit of Hughes & Company. The daughter of Hughes, who was at another time in his employ, testified thus:

"Q. While the California Insurance Company was doing business with Hughes & Company under your management, who collected the premiums?"

"A. Why, I did; if there were any collected, I did it.

"Q. And who remitted the premiums to the company?"

"A. I did; Mr. Hughes didn't have anything to do with it."

There is no other evidence about payment of any premium. It will be noted that what we have set out is very indefinite as to who received the payment, and there is no showing that the defendant received any of it. Moreover, if, as the plaintiffs contend, it was paid on the instrument they quote, it was paid on their contract with Hughes & Company, and not on any agreement with the defendant. Besides all that, even if the defendant received the money with the application for the insurance, it had a right to rely upon its counter offer as against incurring any obligation,

unless the plaintiffs seasonably rejected it. Having received the application on behalf of the plaintiffs through Hughes & Company, the defendant had a right to return its counter offer to the same source, and under these circumstances the least that can be said is that until the negotiations are either closed by the acceptance of an offer as made on one side, or they are broken off, no contract would arise; and the utmost the plaintiffs could do would be to recover the payment as for money had and received.

The evidence does not show that the minds of the parties met upon the same proposition and hence no contract was proved. The judgment of nonsuit was right and should be affirmed.

AFFIRMED. REHEARING DENIED.

BEAN, J., concurs in the result.

Argued October 28, reversed and remanded December 23, 1919.

STANFIELD v. ARNWINE.

(185 Pac. 759.)

Pleading—Reply not a Departure from Complaint.

1. In an action by the purchaser of lambs for the seller's failure to deliver, where the complaint alleged that the seller failed and refused to deliver the lambs or any part of them, the allegation of the reply that those offered by the seller were undersized and unmerchantable, contrary to contract, did not constitute a departure.

Sales—Trial—Effect of Erroneous but Honest Rejection of Goods Offered—Instructions not Applicable to Evidence.

2. In action by buyer of lambs for seller's failure to perform, wherein the seller counterclaimed for the buyer's breach, the buyer was liable on the seller's counterclaim if the seller had in truth complied with the contract, even though the buyer honestly rejected the lambs offered as falling below his construction of the requirements of the contract, and instructions relative to the buyer's right to recover the part of the price paid in case of an honest rejection were not pertinent to the issues.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is an action for the recovery of money. The substance of the complaint is, that on August 12, 1918, plaintiff and defendant entered into a written contract whereby plaintiff was to purchase from defendant, 3,800 head of mixed lambs then on the range, being all of defendant's 1918 crop of lambs, at the agreed price of \$9 per head; to be delivered, f. o. b. cars, at Crane, Harney County, Oregon. It is alleged, *inter alia*, that such lambs should not be "cripples, bums or burry wools," and should be "of good size and in merchantable condition." Plaintiff, at the time of the execution of the contract, paid to defendant \$5,000 of the purchase price, and on the date of delivery was at Crane, with his servants, ready to inspect, receive and pay for the sheep. The default of defendant is alleged as follows:

"Plaintiff alleges that defendant failed and refused, and still fails and refuses to deliver said sheep called for by said contract, or any part of same; that the plaintiff was ready and willing at the time called for in the contract, and ever since has been, and is still willing, to receive from the defendant the sheep called for by the contract, and pay for the same."

There are further allegations of expenses incurred by plaintiff in providing cars, etc., for the transportation of the sheep, and loss by reason of an increase in the market price of lambs, and a prayer for the recovery of the \$5,000 advanced, and the other items of alleged damages, amounting, in all, to \$9,085.23. Defendant answers, admitting the execution of the contract, and the receipt of \$5,000 as an advance payment upon the purchase price of the lambs, but fur-

ther asserts that at the time and place specified for delivery, he had the lambs, and was ready, able and willing to deliver the same to plaintiff, in accordance with the terms of the contract, and so informed plaintiff, but that plaintiff repudiated the contract and refused to receive the lambs and refused to make payment of the remainder of the purchase price, and demanded a return of the \$5,000 already paid. Defendant further alleges:

"That the defendant has always been, and now is, ready, willing and able to deliver to the plaintiff the said thirty-eight hundred head of lambs in accordance with the terms of the contract, and now holds said lambs in readiness to be so delivered at any time or place that said plaintiff might designate in substantially the same manner described in said contract."

Then follows a plea of counterclaim for damages in the sum of \$7,600, and a prayer for the residue of such sum after applying the \$5,000 payment thereon.

The reply, after several consistent denials, alleges:

"Plaintiff further replying to paragraph three of said further answer admits that on or about October 1, 1918, the defendant had, at Crane, Oregon, or offered to deliver to plaintiff, under said contract, about 2,800 head of lambs, but alleges that said lambs which the defendant so offered to deliver to plaintiff at said time did not come up to the terms and conditions and specifications of said contract of sale referred to in plaintiff's complaint, in that, and for the reason that said lambs so offered by the defendant under said contract were not of good size, and were not in merchantable condition; but, on the contrary, the same were undersized and in poor condition; and in no respect complied with the terms and conditions of said contract. Admits that it is true that the plaintiff refused to accept said lambs so offered at said time, and demanded that the defendant return to the plaintiff said \$5,000 which plaintiff had paid to de-

fendant on said contract at the time the same was executed.”

There was a trial by jury, resulting in a verdict and judgment for plaintiff, from which defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Wallace McCamant*, *Mr. P. J. Gallagher* and *Mr. W. H. Brooke*, with oral arguments by *Mr. McCamant* and *Mr. Gallagher*.

For respondent there was a brief over the names of *Mr. E. R. Coulter*, *Messrs. Davis & Kester* and *Mr. O. B. Mount*, with oral arguments by *Mr. George E. Davis* and *Mr. Coulter*.

BENSON, J.—There are a great many assignments of error, but we need not consider more than two of them, since all of the remainder are substantially involved therein.

1. The first of these is, that the allegations of the reply, regarding the condition and quality of the lambs that were offered by defendant for delivery at Crane, constitute the issue upon which plaintiff's recovery is based, and that these allegations present a cause of action not set out in the complaint and are therefore a departure. The allegation of the complaint is:

“That defendant failed and refused and still fails and refuses to deliver said sheep called for by said contract, or any part of same.”

Defendant interprets this averment to mean that no lambs whatever were tendered for delivery. It is equally susceptible, however, of the meaning, that while defendant did offer certain lambs for delivery,

they were not of the kind "called for by said contract," and this, in fact, was what the plaintiff intended thereby. The reply is not inconsistent with the complaint and does not contain a departure. The most that can be said of the complaint in this respect is, that it is a defective statement of the cause of action.

2. The next question for our consideration arises upon certain instructions given to the jury by the trial court, the first of which is as follows:

"There has been a \$5,000 payment made to the defendant in this case. The plaintiff sues to recover this \$5,000 and also to recover damages for the alleged breach of the contract on the defendant's part. The rule of the law governing your conclusion in reference to this \$5,000 will differ somewhat from the rule of law governing damages. It is the law, Gentlemen, that where one party under a contract of sale has made a payment down on the purchase price, that he may not recover that \$5,000 back if he has wholly abandoned, repudiated, refused, or failed to carry out his contract, but he is entitled to recover the \$5,000 unless he has wholly failed, refused, and abandoned his contract. Even though, in this case, you should find that the sheep were of the quality required by this contract and that Stanfield, or Stanfield's agent, through an error of judgment turned these sheep down, and failed to accept them, plaintiff would still be entitled to recover, unless you find that he wholly failed and refused to comply with his contract, and abandoned the same. Even though there was an error in judgment on the part of Stanfield, or his agent, in refusing to accept these sheep, if his agent, in good faith, believed that he was right and turned the sheep down, and did not wholly abandon or refuse to carry out his contract, for any other reason than an error of judgment, he would still be entitled to recover the \$5,000."

The other instructions of which defendants complain are an elaboration of the doctrine above quoted. In support thereof, plaintiff relies upon the authority of *Hanley v. Combs*, 48 Or. 409 (87 Pac. 143), and this appears to have been the authority by which the trial court was guided in framing his charge to the jury. It must be observed, however, that there is a marked difference in the issues presented by that case and by the one at bar. In the former, the complaint sought nothing but a recovery of the advance payment which had been made upon the purchase price of cattle, because the defendant had wrongfully rescinded the contract. The defendant answered admitting the rescission, justifying it upon the ground that the plaintiff had abandoned the contract, whereby he had lost his right to recover the partial payment. The action was not upon the contract, to recover damages for the breach thereof, but as for money had and received, both parties treating the contract as a thing of the past. In the instant case, however, we find both parties treating the contract as still in effect. Both allege their readiness and willingness to perform, and both seek damages for a breach. The present action then, is nothing more than an action for damages for a breach of the contract, with a counterclaim of like character upon the part of the defendant. The law applicable thereto is quite different from that which should be applied where the contract has been rescinded. The distinction is clearly expressed by Mr. Chief Justice BEAN in the case of *Hanley v. Combs*, 48 Or. 409 (87 Pac. 143), in these words:

“The mere refusal to pass cattle which in fact complied with the contract, if done in good faith, would not of itself amount to such a repudiation, and would not justify the defendant in rescinding the contract,

although it might render plaintiff liable in damages for a breach thereof."

In an action like the one before us, the questions presented are: Has there been a breach of the contract? If so, by whom? And which party is entitled to recover? In such an action, the plaintiff is liable upon defendant's counterclaim, if, in truth, defendant has complied with the terms of the agreement, even though plaintiff honestly rejected the lambs as falling below its demands. The instructions were therefore not pertinent to the issues. For this there must be a reversal.

We do not pass upon the question as to whether or not the allegations of the complaint are sufficient when measured by the doctrine announced in *Barnard v. Houser*, 68 Or. 240 (137 Pac. 227), since upon a retrial the plaintiff will have an opportunity to amend his complaint, and thereby avoid any unnecessary doubt.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Argued at Pendleton October 29, affirmed as modified December 23, 1919.

LAURANCE v. BROWN.

(185 Pac. 761.)

Waters and Watercourses—Acquisition of Water Rights by Appropriation not Dependent on Riparian Ownership.

1. A water right acquired by an appropriation and beneficial use upon land in the quiet possession of the appropriator, and upon which he has made valuable improvements and reclaimed in part, is not dependent upon the title to the soil upon which the water is used, in view of Rev. Stats. U. S., Section 2339 (U. S. Comp.

Stats., § 4647), Sections 6534, 6561, L. O. L., Section 6594, as amended by Laws of 1913, page 273, and Section 6595, and Laws of 1913, page 531.

From Grant: DALTON BIGGS, Judge.

In Banc.

This is a suit to determine conflicting claims to the waters of Graham Creek, in Grant County. The trial court awarded the plaintiffs a prior right and defendants appealed.

Graham Creek is a non-navigable perennial stream having its source in a spur of the Blue Mountains, emptying its waters in the John Day River. From the bottom lands bordering on this river the hills rise on either side, forming the bench lands which extend to the mountains. Through these bench lands are gulches, some of them dry or such as contain a flow of water only in times of freshets. On the south of the John Day River and west of Graham Creek, above Prairie City, is one of these dry gulches, known for a long time as Winegar gulch.

AFFIRMED AS MODIFIED.

For appellants there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondents there was a brief over the names of *Mr. Erret Hicks* and *Mr. George H. Cattanach*, with an oral argument by *Mr. Hicks*.

BEAN, J.—From a careful reading of the testimony and record in the case and after an examination and consideration of the briefs of the respective parties we find the following:

About 1870, A. C. Clark settled upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21

and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22, Tp. 13 S., R. 34 E., W. M., in Grant County, Oregon, the same being then vacant public land of the United States. June 2, 1870, Clark filed with the clerk of Grant County a notice of intention to appropriate all the waters of Graham Creek for irrigation purposes, and thereafter selected a point of diversion for a ditch on the west side of the creek and near the center of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 15, Tp. 14 S., R. 34 E., W. M., and commenced the construction of a ditch for conveying the waters of Graham Creek from that point to the above-mentioned land for the purpose of watering livestock and irrigation purposes, and during the year 1871, completed the ditch to a gulch known as Winegar gulch. In 1872, Frederick Winegar settled upon the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 28, Tp. 13 S., R. 34 E., W. M., and on January 29, 1872, purchased from A. C. Clark his interest in the above-described Graham Creek ditch and water right, and in the spring of that year began the construction of a ditch from a point about one fourth of a mile below the head of the ditch commenced by Clark and completed the construction thereof to the said lands and conveyed the waters of the stream through the ditch to and upon the land for irrigation and domestic purposes, and on March 30, 1880, the land was conveyed to Winegar as a homestead.

About April 4, 1873, Frederick Winegar became the owner of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, Tp. 13 S., R. 34 E., W. M., in Grant County, known as "Road Lands," and during that year appropriated and used water from Graham Creek ditch to irrigate a portion thereof. Winegar continued in the possession and ownership of the

above-described land in Sections 21 and 28 until his death, April 29, 1889; and while he occupied the lands, cultivated and irrigated 66.4 acres, and raised thereon grain, hay, orchard and garden, and used the waters for stock and domestic purposes. In 1881 the SE. $\frac{1}{4}$ of Sec. 28, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, Tp. 13 S., R. 34 E., W. M., being unoccupied, Frederick Winegar took possession, began the cultivation of the land and diligently used the waters of Graham Creek in the irrigation of a portion thereof until December, 1886, when Charles H. Winegar, his son made a pre-emption filing on the above-mentioned SE. $\frac{1}{4}$ of Sec. 28, and thereafter occupied and tilled the same and used such waters for the irrigation of 58 acres thereof and on October 13, 1891, obtained title to the lands from the United States. Frederick Winegar continued to occupy the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28 heretofore described, until his death, and reduced to cultivation 30.3 acres of the land and irrigated it with the waters of Graham creek and ditch.

After the death of Winegar his estate was administered in the County Court of Grant County and all of the Frederick Winegar lands including the ditch and water rights appurtenant thereto were sold by his legal representatives to John T. Bailey November 8, 1899. On the same date Charles H. Winegar sold to Bailey the SE. $\frac{1}{4}$ of Sec. 28, Tp. 13 S., R. 34, with all of his interest in the ditch and water right used in connection with the land. At the time of this sale the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, heretofore mentioned, continued to be unentered government

land, but had been previously occupied and irrigated by Frederick Winegar with the waters from Graham Creek ditch. After the sale of the premises to Bailey, he occupied and cultivated all of the lands above described, including the unentered lands, until January 11, 1902, when he made entry upon the last described land under the desert land laws of the United States, and held and cultivated the lands until January 26, 1906, when they were conveyed to him by patent from the United States.

June 11, 1900, Bailey sold to Mrs. Laura Weeks the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, Tp. 13 S., R. 34 E., W. M., and thereafter Bailey and his successors in interest farmed all of the remainder of the lands and continuously used the water of Graham Creek through the ditch in irrigation thereof and for stock and domestic purposes, until September 29, 1906, when the whole of the lands and water rights were sold to E. P. Laurance. About April, 1907, for the purpose of bringing a part of the waters of Graham Creek on to the land owned by him in sections 28 and 21, Laurance constructed a branch ditch from the Winegar ditch, taking it out about a half mile below the head of the ditch and extending it in a northwesterly direction. In 1907, he commenced the use of waters from this branch ditch for the purpose of irrigating the land then in cultivation in section 33 along the Winegar gulch, the same being land which he was entitled to irrigate with the waters from Roberts Creek ditch, replacing those so used with the waters from the Roberts Creek ditch so that no greater amount of water was used from the Graham Creek ditch than had theretofore been used by him and his predecessors in interest. Laurance occupied, cultivated and irri-

gated the lands until the time of his death, September 5, 1912.

The plaintiffs, S. A. Laurance and Ellen L. Laurance and Hester Paulus are the heirs at law of E. P. Laurance, deceased, and since the date of his death have been and now are the owners of all the lands purchased by Laurance, and have cultivated and irrigated them until the commencement of this suit. The plaintiff, Nellie Gillespie, is the owner by mesne conveyances from Mrs. Laura Weeks of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, Tp. 13 S., R. 34 E., W. M., and has cultivated the lands and used the waters of Graham Creek for the irrigation of same until the commencement of this suit.

For about fifteen years prior to this suit plaintiffs and their predecessors have used the water from Graham Creek for the irrigation of their lands practically in the same manner as claimed by them without interference or question on the part of defendants, indicating that during all of such time the right to the water by defendants and their predecessors was inferior and subject to the rights of plaintiffs, and that it was so considered by the interested parties. The total amount of land irrigated and reduced to cultivation by the plaintiffs and their predecessors in interest is 154.7 acres. The date of the relative priority of the appropriation of such water of plaintiffs is 1873.

The defendants are the owners of the NW. $\frac{1}{4}$ of Sec. 14, Tp. 14 S., R. 34 E., W. M., which was settled upon in 1872, by Mark Dinsmore and was transferred through different parties to M. A. Preston who secured title thereto from the United States on February 23, 1886. In 1881, Preston took a ditch out of Graham Creek at a point some distance below the

point of diversion of the Winegar ditch and irrigated about 28 acres of the land last described. At that time plaintiffs' predecessors were using the water from Graham Creek for all of the lands irrigated by them. Defendants and their predecessors have only used such water as flowed past the head of the Winegar ditch.

The trial court awarded plaintiffs a prior right to three cubic feet per second, or 120 miner's inches, of water as a continuous flow during the irrigation season from April 1st to September 1st of each year, not to exceed a total flow of more than three acre-feet per acre for 154.7 acres of their land, and decreed that thereafter the plaintiffs are entitled to the usual flow of the creek for stock and domestic purposes; and found that the irrigation season, including irrigation for pasture, begins about April 1st and extends to about September 1st of each year, and that three acre-feet per acre is sufficient for the irrigation of the lands of plaintiffs and defendants. The trial court concluded that defendants are entitled to the use of the waters of Graham Creek through what is known as the Brown or Preston ditch, diverted at a point near the northeast corner of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, Tp. and range aforesaid, sufficient for the irrigation of 28 acres of land in the NW. $\frac{1}{4}$ of Sec. 14, Tp. 14 S., R. 34 E., W. M., not to exceed three acre-feet per acre during the irrigation season from April 1st to September 1st, and not exceeding a continuous flow of one miner's inch per acre; and that defendants' appropriation and right to the use of water is subject and inferior to the right of plaintiffs to the amount allowed to plaintiffs for the irrigation of their land.

The date of the relative priority of the defendants' appropriation of such water from Graham Creek is 1881. It appears that some water from Graham Creek was used by defendants' predecessors prior to that date, but that for a long time the water for defendants' lands has been obtained from another stream.

From the testimony it appears to us that by a judicious and thorough use of the amount of water allowed plaintiffs during the season until July 1st of each year, and thereafter a careful use of water at the rate of one cubic foot per second for 80 acres, or approximately one-half inch of water, miner's measurement, under a six-inch pressure, would be sufficient to properly irrigate plaintiffs' lands. This quantity should be measured at the head of the lateral ditches or where the same is taken from the main ditch. The amount in the aggregate for each season is not to exceed three acre-feet of water per acre. After September 1st plaintiffs should be allowed a sufficient amount of water for watering their livestock and for domestic purposes. Subject to the rights of plaintiffs, after the first of July of each year in case there is sufficient water flowing in Graham Creek, the defendants should be allowed the same amount of water to the acre or one eightieth of a cubic foot per second, per acre, for 28 acres. After the amounts of water awarded to the respective parties, or so much thereof as the parties may economically use without any unnecessary waste, the remainder of the waters of Graham Creek should be permitted to flow down its accustomed channel. To the extent above indicated the decree of the lower court will be modified. The change may affect the situation from about the first to the tenth of July, a somewhat critical time depending on the amount of water in the stream.

There is some contention on behalf of defendants as to the water right appurtenant to the land entered as a pre-emption by Charles Winegar in 1886, the appropriation having been made and the water applied to this land while it was still a part of the public domain by the father of the entryman. The same position is taken as to the use of water upon the land embraced in the desert entry of John T. Bailey.

When the western states were organized and adopted their Constitutions, there was found to be a custom which had grown from the use of water for mining purposes and the irrigation of small crops, to an expanded use by the early settlers and to the appropriation of water for the irrigation of larger tracts of land, and for other beneficial uses, independent of or without regard to riparian rights. Many water rights were then held by virtue of such custom and few or none under claim of riparian ownership. The result obtained that so far as such customary rights existed, with reference to streams upon the public domain, they were recognized as establishing a good title. When many of the states were formed provision was made for the acquirement of water rights by appropriation rather than by riparian ownership: 1 Farnham on Waters and Water Rights, 605. The case of *Crawford Co. v. Hathaway*, 61 Neb. 317 (85 N. W. 303), is authority for the statement that U. S. Rev. Stats., Section 2339 (U. S. Comp. Stats. 1912, § 4647; 9 Fed. Stats. Ann. (2 ed.), p. 1349), was not intended to grant from the federal government to the people of the state the waters on the public domain, but to confirm the rights of those who have acquired, under certain conditions, the use of the water, and calls that right a vested one, even though the waters are taken from streams

upon the public domain and without the assent of the government. The right to appropriate water exists without private ownership in the soil or without perfect title thereto, as against all persons except the government or its grantees: Gould on Waters (3 ed.), §§ 230, 240; *Hill v. Newman*, 5 Cal. 445 (63 Am. Dec. 140); *Hough v. Porter*, 51 Or. 318, 421 (95 Pac. 732, 98 Pac. 1083, 102 Pac. 728).

In an early act of the legislature of this state relating to the appropriation of water for general use and irrigation, "all existing appropriations of water made for beneficial purposes" in accordance with law, rule of court or established custom, are declared to be respected and upheld: Section 6534, L. O. L. The same provision was made in the act of 1899 (Section 6561, L. O. L.), and in the Water Code of 1909, the vested rights of any person to water are carefully preserved unimpaired: See Sections 6594 (amended by Gen. Laws of Oregon 1913, p. 273) and 6595, L. O. L. Our statute provides that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state: Gen. Laws of Oregon 1913, p. 531; *Hill v. American Land & Livestock Co.*, 82 Or. 202, 209 (161 Pac. 403). Such right acquired by an appropriation and beneficial use upon land in the quiet possession of the appropriator and upon which he has made valuable improvements and reclaimed in part, is not dependent upon the title to the soil upon which the water is used. That question can only arise between conflicting claimants to the title to land reclaimed by irrigation, and does not enter into this case. We therefore conclude that the point contended for by counsel for defendants is not well taken.

The evidence clearly supports the findings of the Circuit Court in the main. With the slight modification

above suggested the decree of the lower court is affirmed. Neither party will recover costs or disbursements in this court. **AFFIRMED AS MODIFIED.**

Argued at Pendleton October 29, modified and affirmed December 23, 1919.

PROPST v. WILLIAM HANLEY CO.

(185 Pac. 766.)

Contracts—Modification of Written Agreement by Subsequent Parol Contract.

1. A written agreement may be modified by a subsequent parol contract, notwithstanding the general rule embodied in Section 713, L. O. L.

Sales—Waiver of Contract Provision as to Method of Measurement of Hay Sold.

2. Provision in contract for sale of hay crop that the buyer should stack it for measurement could be waived, either by a subsequent agreement that part of the hay taken by buyer for immediate use should be weighed, or by seller's estoppel to deny such waiver, by conduct luring the buyer into a situation where he would be in the plight of a covenant breaker liable for damages for breach where none was intended, such as, without objection, allowing the buyer to take such hay without stacking it for measurement.

Contracts—Consideration Necessary to Contract if Waiver.

3. Waiver may be the subject of contract, for which a consideration is requisite, the same as in any other contract.

Interest—From Date of Judgment Rather Than from Breach of Contract.

4. In recovery for seller's breach of contract of sale of hay crop, interest could not be allowed from the time of breach to the day of trial, but only from date of judgment.

Appeal and Error—Correcting Judgment in Matter of Interest.

5. Where judgment for plaintiff buyer for breach of contract of sale of hay crop was erroneous only in including interest on the amount from the date of breach up to the day of trial, the Supreme Court, having all the data before it, could make the necessary computation and adjust the matter by modifying the judgment, eliminating the item of interest.

Costs—Modification of Judgment Sufficient to Carry Costs to Appellant.

6. The Supreme Court's modification of judgment for plaintiff buyer for breach of contract for sale of hay crop, by eliminating the

item of \$148.33 interest on the amount from time of breach up to day of trial, was sufficient to carry costs in favor of defendant in the Supreme Court.

From Malheur: DALTON BIGGS, Judge.

In Banc.

It is agreed that the defendant as party of the first part and the plaintiff as party of the second part entered into a written contract on June 30, 1917, whereby the defendant sold to the plaintiff the entire crop of hay for that year grown on certain realty near Juntura, Oregon, at a price of \$14 a ton, reserving to itself seventy-five tons to be used in operating the property. The defendant was to cut, rake and shock the hay. The plaintiff was to haul it and stack it, except the reserved portion. The hay was to be measured thirty days after stacking, and paid for at that time. There are other provisions in the contract not involved here and not necessary for a clear statement of the case.

The plaintiff recites this contract, alleged performance of it and charges that the defendant wrongfully rescinded the contract and refused to comply with it. He also makes this allegation in his complaint:

"That shortly after the making of said written agreement the plaintiff informed the defendant and its manager, William Hanley, that he desired a part of this hay delivered to him prior to the lapse of thirty days' time, the said hay to be for the immediate use of the plaintiff, and it was thereupon stipulated and agreed orally by these parties that the plaintiff might take and use such amount as he needed prior to thirty days in which said hay should be measured, and was to weigh and keep track of said hay, and pay therefor the same price as for other hay, to wit: \$14 per ton, and that the said written agreement should be construed in such a manner by these parties so as to permit the said plaintiff to use and feed such amount of

hay as might be necessary prior to measurement thereof; that relying upon said stipulation and the construction of said written agreement, the said plaintiff did use twenty-six tons of hay for which he is indebted to the defendant, but which should be credited upon the amount of money he expended in cutting and stacking said first crop of hay."

As stated, the defendant admits the making of the contract, but denies the quoted allegation of the complaint. The defendant charges that the plaintiff violated the agreement in that he did not stack the hay in accordance with the terms and conditions of the agreement, but hauled it off the premises without the defendant's consent, sold some of it to other parties and afterwards refused to perform his part of the contract. It claims damages for the amount of hay sold and disposed of by the plaintiff, in the sum of \$500. The new matter of the answer is challenged by the reply.

A jury trial resulted in a verdict in favor of the plaintiff, rendered on April 29, 1919, in the sum of \$1,631.55. From the consequent judgment the defendant appealed.

MODIFIED AND AFFIRMED.

For appellant there was a brief over the names of *Mr. W. W. Wood* and *Mr. John W. McCulloch*, with oral argument by *Mr. Wood*.

For respondent there was a brief with oral arguments by *Mr. William H. Brooke* and *Mr. P. J. Gallagher*.

BURNETT, J.—Two questions are presented in the argument in the defendant's brief: One is the contention that in allowing the plaintiff to offer proof of the quoted allegation of his complaint the court violated the rule against allowing other evidence of the terms of

an agreement than the contents of the writing itself. The other assignment of error is predicated upon an instruction given by the court to the effect that the measure of damages was the difference between the contract price of the hay and the market value thereof on the date of the breach, together with interest at 6 per cent on that sum until the trial of the action.

1. It is said in effect in 1 Elliott on Evidence, Section 581, cited by the defendant, that it is competent to modify a written agreement by parol contract made after the writing, and that—

“If the parol contract was in fact made subsequent to the written contract and evidence thereof is otherwise unobjectionable, it makes no difference how short the interval may have been.”

It is common learning, embodied in Section 713, L. O. L., that when a contract has been reduced to writing and signed by the parties it is to be considered as containing all the terms of the stipulation, “and therefore there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing,” except in certain instances not here involved.

The issue between the parties then, is whether there was a subsequent agreement. That is one aspect of the contention. Another is that the language of the complaint amounts in legal effect to stating a waiver by the defendant of that provision of the contract requiring the hay to be measured instead of weighed. Without quoting it in detail, it is enough to say there was evidence properly before the jury upon which it could be found that the quoted allegation of the complaint was true.

2, 3. Waiver may be made the subject of contract, for which a consideration is requisite, the same as in any other contract. In practical effect measurement of the hay amounts to an estimate of its weight. It is common knowledge that several conditions may affect the actual avoirdupois of stacked hay. For instance, if it is piled loosely or in low stacks it will weigh less per cubic foot than if packed densely in high stacks, because the greater weight of the higher stack will compress the lower part, so that a cubic foot of it will weigh more than the same unit of a low, loose pile. The contract did not provide how the hay should be stacked. The plaintiff had the opportunity of building high stacks with the chance of an advantage in tonnage by measurement. In actually weighing the hay taken from the field he surrendered a probable advantage which might have accrued to him in stacking, and, considering the matter of the change in the contract or waiver of its terms from the standpoint of a contract, the jury would be authorized to find from that circumstance of disadvantage to the plaintiff a consideration supporting the supplementary agreement. The contract, being for the sale of personal property of greater value than fifty dollars, was necessarily within the statute of frauds. The evidence, however, was sufficient to allow the jury to find that there was a fully performed parol agreement for a substitute method of ascertaining the quantity of hay hauled away for immediate use. We are concluded by the verdict on the existence and actual performance of such a supplemental stipulation which in that respect obviates the effect of the statute within the meaning of *Sayre v. Mohney*, 35 Or. 141 (56 Pac. 526), and precedents there noted. It is said in 40 Cyc. 263:

"The confusion among the cases as to the necessity of a consideration for waiver arises out of the element of estoppel which frequently appears in the particular case. In the absence of conduct creating an estoppel, a waiver should be supported by an agreement founded upon a valuable consideration, although a consideration, such as is necessary to support a contract, is not always essential. Where the acts of a party are such as to estop him from insisting upon the right claimed to have been relinquished, no consideration is necessary."

The same volume, at page 252, defines a waiver thus:

"The act of waiving, or not insisting on some right, claim, or privilege; a foregoing or giving up of some advantage, which, but for such waiver, the party would have enjoyed; an election by one to dispense with something of value, or to forego an advantage he might have taken or insisted upon; the giving up, relinquishing, or surrendering some known right; an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment or waiver of such right; the intentional abandonment or relinquishment of a known right; the relinquishment or refusal to accept a right; a voluntary relinquishment of some right; the voluntary relinquishment of some existing right; the voluntary relinquishment of a known right; a voluntary relinquishment of the right that one party has in his relations to another; the voluntary abandonment or relinquishment by a party of some right or advantage; a voluntary surrender and relinquishment of a right; the voluntary relinquishment or renunciation of some right; the voluntary and intentional abandonment, renunciation, or relinquishment of a known legal right; the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed; the voluntary yielding up by a party of some existing right; a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it

may operate as a trap to the other party, to insist upon it afterwards; the passing by of a thing, or a refusal to accept it; the renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure; an implied consent by a failure to object."

There was testimony that the plaintiff hauled about twenty-six tons for his own immediate use, as he was in the livery and feed business at the time, and all with the knowledge of the defendant's agent in charge of the ranch where the hay was grown, without any objection being made. It appears in evidence, too, that the price of hay nearly doubled over the contract price, and a situation is delineated where the jury might very properly believe that with the knowledge of the plaintiff's action in that respect the defendant did not object, and that the plaintiff in good faith believed from the conversation immediately after the execution of the writing, had with the agent of the defendant, that he had a right to take the hay for his use. Waiver is said to be akin to estoppel, although not identical, and the jury might readily have believed that the defendant lured the plaintiff into a situation where he would be in the unenviable plight of a covenant breaker, rendering him responsible in damages for a breach of the contract, when none was intended, all of which would give rise to the estoppel element of waiver. These considerations lead to the conclusion that the Circuit Court was not in error in allowing testimony in support of the quoted allegation of the complaint. By it was taken to the jury the question of waiver by defendant of one of the details of the contract requiring measurement rather than weighing of the hay in ascertaining the quantity, whether the waiver was based on sup-

plemental contract made after the written one and requiring a consideration, or took effect as upon an estoppel.

4-6. The cases of *Williams v. Pacific Surety Co.*, 77 Or. 210 (146 Pac. 147, 149 Pac. 524), and *Sargent v. American Bank & Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431), settled the matter of interest adversely to the plaintiff, so that the court was in error in directing the jury to allow interest on the amount from the time of the breach up to the day of trial. However, having all the data before us, this matter may be adjusted in this court. The testimony shows that the defendant gave notice of its rescission of the contract on August 18, 1917. That constituted the breach of the contract, if any there was. The question then is: What sum of money on that date at 6 per cent would produce the amount named in the verdict, or \$1,631.55, on April 29, 1919, the date of the rendition of the verdict? What is known as the amount in computation of interest is the product of three factors: the time, the rate and the principal. We have the two factors of rate and time, and the product, \$1,631.55. By dividing the product of the three factors by the product of two of them, we ascertain in the quotient the third factor, or the original principal. In this case a computation on that basis shows that \$1,483.22, counting interest at 6 per cent thereon from August 18, 1917, to April 29, 1919, would produce the amount named in the verdict.

The judgment will therefore be modified by deducting from the amount of the recovery the difference, amounting to \$148.33; but otherwise it will be affirmed. The modification is sufficient to carry costs in favor of the defendant in this court.

MODIFIED AND AFFIRMED.

Argued at Pendleton October 29, affirmed December 23, 1919.

WARD v. WARD.

(185 Pac. 906.)

Gifts—Proof of Parol Gift of Land Must be Clear.

1. In suit by father against his daughter and her husband to be adjudged the owner of real property standing in his name but in defendants' possession and claimed by them under parol gift, defendants had the burden of establishing the gift clearly and satisfactorily, the same as if they were suing to compel plaintiff to specifically perform a parol contract for a gift of land.

[As to evidence sufficient to establish a parol gift of land, see notes in 12 Ann. Cas. 494; 21 Ann. Cas. 289.]

From Gilliam: DAVID R. PARKER, Judge.

In Banc.

This is a suit in equity brought by the plaintiff, Fremont Ward, for two purposes; one to secure a partition of certain lands owned jointly by himself and the defendant, Mary Lee Ward, the other to secure a decree adjudging him to be the owner of certain real property, the title to which stood in his name, but which, according to the contentions of the defendants, Eddith Knight and James Knight, his daughter and son-in-law respectively, were given to them by the plaintiff and his then wife, the defendant Mary Lee Ward. Amelia E. Wade was made a defendant by reason of the fact that she held certain liens upon the lands in question. The facts, which gave rise to the suit, are in brief as follows:

The defendant Mary Lee Ward secured a decree of divorce from the plaintiff Fremont Ward on June 15, 1917, in Multnomah County. Among other relief, she was awarded a one-third interest in the real property owned by the plaintiff Fremont Ward, to partition which the instant suit was brought by the plaintiff.

Eddith Knight and James Knight, who are in possession of a portion of the land, claiming the same under parol gift, were made defendants and filed an answer in which they set up their claims to the land and asked for affirmative relief. It is upon the issues joined between the plaintiff and the defendants, Eddith Knight and James Knight, as to the ownership of the lands held by the Knights and claimed under a parol gift and upon the issue joined between the plaintiff and the defendant Mary Lee Ward as to the ownership of the Knight lands, that this appeal is taken.

In his complaint, the plaintiff alleges that the defendants Eddith Knight and James Knight, her husband, are occupying the lands in question, to wit:

“The NW. quarter of section 11, and the N. half of the SW. quarter, and the NW. quarter of the SE. quarter of section 11, and any part of the lands in section 10 which have not been heretofore conveyed by the Wards and which is not within the lands described in the plat to Ward’s Addition to Condon and which lie north of the Condon and Lone Rock County Road; all in T. 4 S., R. 21 E. of the W. M.,

and that they have no interest in said land or any of it, and the plaintiff prays for a decree adjudging him to be the owner in fee simple of an undivided two-thirds interest therein.

In answer to this contention of the plaintiff, the defendants Eddith Knight and James Knight have set up their claim to the lands in question, which gives rise to the question at issue between the plaintiff and the defendants Knight. It is the contention of the defendants Knight that the land in question was given to them by their father and mother in 1912, that the lands were given to them at that time upon the agreement and understanding that the said defendants should occupy

the land, improve it and make it their home, and when they had done so, the plaintiff and his then wife, the defendant Mary Lee Ward, would give them a deed therefor.

The trial court denied the claim of the Knights to the land and set the same off to the defendant Mary Lee Ward in the partition suit, by reason of which she prosecutes this appeal because she had joined with her husband, the plaintiff, in the gift of the lands to the Knights.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Shanks & Horner* and *Messrs. Angell & Fisher*, with an oral argument by *Mr. Homer D. Angell*.

For respondent there was a brief over the names of *Mr. Jay Bowerman* and *Mr. T. A. Wienke*, with an oral argument by *Mr. Bowerman*.

McBRIDE, C. J.—The testimony in this case consumes several hundred pages of the transcript, it is very contradictory and has been given the closest attention. A reproduction or analysis of it here would necessarily consume many pages in the reports with matter of no interest to anyone except the parties, and of no value to them, the general public, the profession, or the courts. No disputed question of law is involved.

As between the Knights and the plaintiff, the case stands upon the same footing as if they were suing to compel plaintiff to specifically perform a parol contract for a gift of land. Such contract must be clearly and satisfactorily established: *Thayer v. Thayer*, 69 Or. 138 (138 Pac. 478), and cases there cited. See, also, *Tonseth v. Larsen*, 69 Or. 387 (138 Pac. 1080); *Goff v. Kelsey*, 78 Or. 337 (153 Pac. 103).

Upon the whole testimony here, we are not convinced that plaintiff made such an agreement. On the contrary, we are of the opinion that the weight of testimony indicates that he did not, and that the claim of defendants is an afterthought and the result of a conspiracy between the Knights and plaintiff's divorced wife. The judge who tried the case below and who had the advantage of hearing all the witnesses and of observing the manner in which they gave their testimony, found that plaintiff never made the alleged promise, and a careful perusal and re-perusal of the voluminous testimony brought here, satisfies us that he was sound in his conclusions. This renders unnecessary a consideration of the other questions discussed in the briefs, and the decree will be affirmed. **AFFIRMED.**

Submitted on briefs November 4, affirmed December 23, 1919.

RAE v. HEILIG THEATRE CO.

(185 Pac. 909.)

Appeal and Error—Review of Refusal to Grant Nonsuit.

1. Where a motion for nonsuit is interposed and movant thereafter introduces testimony pertaining to the issues, all of the testimony thus submitted will be considered on appeal in reviewing the question of the refusal to grant a nonsuit.

Appeal and Error—Conflict in Evidence.

2. Supreme Court will not resolve conflict in evidence.

Corporations—Authority of Officers and Agents Governed by General Law of Agency.

3. The power of officers and agents of corporation to bind the corporation is governed by the general law of agency, the underlying principles being the same, and their authority may be implied from their conduct and the acquiescence of the directors.

Corporations—Ratification of Contract by Its Agent.

4. Corporation, having approved auditor's contract with public accountant for services to be rendered corporation and having accepted the benefits of such contract, cannot avoid liability for such services.

Principal and Agent—Presumption That Agency is General.

5. Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general.

Corporations—Implied Authority of Officers and Agents.

6. When in the usual course of the business of a corporation an officer or agent has been allowed to manage certain of its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business; the usual employment being evidence of his powers.

Principal and Agent—Acts of Agent Within Apparent Authority.

7. The principal is bound by the acts of his agent within the apparent authority conferred upon such agent.

Corporations—Authority of Agent.

8. The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purpose of the agency, and other persons are invited to deal with the agent with that understanding.

**Corporations—Authority of Agent to Make Contract for Services
Jury Question.**

9. In action by public accountant against corporation for services rendered upon employment by corporation's agent, where defense was that agent who had employed accountant was not the authorized agent of the corporation, and where corporation, at close of plaintiff's testimony, moved for nonsuit, *held*, that there was competent evidence tending to support findings of fact that agent was the authorized agent of corporation.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc.

This is an action by plaintiff, Alexander C. Rae, against the defendant company to recover the sum of \$500, as the reasonable value of services rendered to the defendant.

The defendant denies the rendition of any services by plaintiff for it. The cause was tried by the court without the intervention of a jury. The court found in favor of plaintiff in the sum of \$215 and from a consequent judgment defendant appeals. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Messrs. Joseph, Haney & Littlefield.*

For respondent there was a brief prepared and presented by *Messrs. Carey & Kerr* and *Mr. Charles A. Hart*.

BEAN, J.—At the close of plaintiff's testimony in chief, counsel for defendant submitted a motion for a judgment of nonsuit. There were several exceptions saved to the rulings of the court relating to the materiality of the testimony. The cause having been tried by the court, we do not understand that there is any question, concerning the admissibility of evidence, presented for determination except in so far as the same bears upon the matter of the nonsuit. There is no controversy in regard to the findings of fact made by the court upon the trial of the cause without a jury being of the same force and effect as the verdict of a jury. The position of the defendant is that there was no competent evidence to support the findings or judgment; that James C. Heilig was not shown to be the authorized agent of the defendant company.

1. It is a well-settled rule that where a motion for a nonsuit is interposed and thereafter the party making the same introduces testimony pertaining to the issues, all of the testimony thus submitted will be considered on appeal in reviewing the question of the refusal to grant a nonsuit.

The testimony in the case tended to show the following facts: Plaintiff is a certified public accountant, having specialized during recent years in income tax work. In August, 1917, Mr. James C. Heilig, the auditor and bookkeeper of the defendant corporation, came to the office of the plaintiff in Portland, bringing with him the cash-book, journal and ledger of the corporation, and also a contract of sale of an interest in the company.

He explained to plaintiff that Mr. Calvin Heilig owned practically all of the stock in the corporation, and that in consummating the deal it was desired to charge off \$90,000 of the indebtedness of the company to Mr. Calvin Heilig, and Mr. Rae's advice was asked in regard to making the entries in the books. Plaintiff examined the contract and made a cursory inspection of the books. Mr. Rae after the consultation considered the matter for a time as to the effect of the federal income tax laws upon such a transaction, and explained to the auditor that if the books should show that the debt was forgiven by Mr. Heilig it might be considered as a gift to the corporation, and according to former rulings subject to a tax and necessitate the payment of a large sum of money. Two visits were made to plaintiff's office by the auditor, who stated to Mr. Rae that his assistance was desired in arranging the matter so as to avoid any chance of loss, and that, "We will pay you for any help you can give us." Plaintiff evolved a plan to increase the capital stock of the Theatre Company in an amount sufficient to offset Mr. Calvin Heilig's account of \$90,000, and pay him by a stock distribution. This plan was submitted to the auditor who expressed his thanks and directed plaintiff to send in his bill. Subsequently the corporation adopted the plan suggested and arranged the matter accordingly. A short time after plaintiff was consulted by the auditor, Frederick Heilig, one of the attorneys for the company, said to Rae, "I have got your suggestion under advisement," and, "We had not considered that side of it. I think your recommendations are good." Plaintiff testified that in a conversation afterwards held by him with the president of the company, he stated, "I see you increased your capital stock and car-

ried out those suggestions," and that Mr. Calvin Heilig said, "Yes, we did that. I think you saved us some money." Mr. Calvin Heilig denies the gist of this conversation. His version of the matter is that James C. Heilig, the clerk of the company, was to take the matter up with the attorneys for the defendant.

2. With the conflict in the testimony we have nothing to do. The statement of the president of the company could fairly be construed by the jury as indicating that the services of the plaintiff were accepted and acted upon by the corporation. The testimony of the president also signified that James C. Heilig was authorized to act for the company in the matter of its accounts. Therefore the evidence of the authority of the agent of the company does not rest alone upon the declaration of such agent.

3, 4. Corporations can only act through their officers and agents. The power of such representatives of a corporation to bind the corporation is governed by the general law of agency, the underlying principles being the same. Their authority may be implied from their conduct and the acquiescence of the directors: 7 R. C. L. 620, § 616. If, as the testimony purported, James C. Heilig was the agent of the defendant, and as such employed the plaintiff as a public accountant to perform services for the defendant which the corporation approved, and accepted the benefits of, then it cannot avoid that part of the arrangements made by the agent imposing a responsibility connected therewith upon the defendant. As said by Mr. Commissioner KING, in *McLeod v. Despain*, 49 Or. 536, at page 563 (92 Pac. 1088, at page 1091, 124 Am. St. Rep. 1066, 19 L. R. A. (N. S.) 276):

"It is too well settled to admit of serious discussion that the principal must adopt or reject the act of his

agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens." Citing: *Coleman v. Stark*, 1 Or. 116; *La Grande Nat. Bank v. Blum*, 27 Or. 215 (41 Pac. 659).

5-8. Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general: *Aerne v. Gostlow*, 60 Or. 113 (118 Pac. 277). The testimony indicated that James C. Heilig customarily incurred and liquidated expenses for the company in matters pertaining to its affairs. It is well settled that when, in the usual course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. The usual employment is evidence of the powers of an agent, and the principal is bound by the acts of his agent within the apparent authority conferred upon such agent: *Martin v. Webb*, 110 U. S. 7 (28 L. Ed. 49, 3 Sup. Ct. Rep. 428; see, also, *Rose's U. S. Notes*). The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent with that understanding: 7 R. C. L. 623, § 620.

9. It therefore appears from the record that there was competent evidence tending to support the findings of fact made by the trial court.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

Argued November 19, reversed and remanded December 23, 1919.

FRANCE v. FRANCE.

(185 Pac. 1108.)

Husband and Wife—Note Signed by Wife not Joint Obligation of Husband and Wife.

1. A promissory note signed by the wife alone is not the husband's joint obligation, since a joint obligation is one by which several obligors promised to perform the obligation, nor is it made joint by the fact that the proceeds were used in paying family expenses, for which Section 7039, L. O. L., renders the husband and wife equally liable.

From Marion: PERCY B. KELLY, Judge.

Department 1.

This is an action based upon a decree, and to enforce one of the requirements thereof. The complaint discloses that on November 13, 1913, a decree of divorce was rendered between the parties hereto, in a suit wherein the present plaintiff was defendant and the present defendant was plaintiff. The decree referred to is made a part of the complaint, and the particular clause upon which this action is founded reads as follows:

"That plaintiff pay the joint indebtedness mentioned herein, amounting to approximately \$900."

The complaint alleges that it was agreed between the parties hereto, prior to the rendition of that decree, that a certain note for \$300, signed by the plaintiff herein and payable to Robert Poinsett, was given by plaintiff as evidence of money borrowed to pay off joint indebtedness of the parties hereto, and was a part of the joint indebtedness referred to in such decree. It is further averred that the \$300, so borrowed by plaintiff from Poinsett was disbursed to pay certain

bills for medical and surgical services, drug bills, telephone service, etc., for the use and benefit of the family of plaintiff and defendant. It is then narrated that defendant thereafter refused to pay the debt, and Poinsett commenced an action against plaintiff which resulted in a judgment against her in the sum of \$328.50, and costs amounting to \$45.50; that defendant refused to pay the judgment and plaintiff was compelled to pay it, and has also become obligated to pay \$50 for legal services in contesting the action on the note, and in this proceeding, for all of which she asks judgment.

To this complaint defendant filed a demurrer upon the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled, an answer was made denying the allegations of the complaint, and alleging that defendant has paid everything that was required by the terms of the decree. A trial by jury was had, resulting in a verdict and judgment for plaintiff, and defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Walter C. Winslow*.

For respondent there was a brief and an oral argument by *Mr. A. G. Thompson*.

BENSON, J.—The demurrer should have been sustained. The decree upon which the action is founded is made a part of the complaint, and it appears therein, that it ordered this defendant to pay the “joint indebtedness mentioned herein,” and none is specified. It is very doubtful as to whether or not it is permissible to look elsewhere for such obligations, since there is

nothing ambiguous or obscure in the language of the decree, but a total absence of the necessary specification, and it is beyond the power of the court to add to the decree. It further appears from the allegations of the complaint, that the Poinsett note is not a joint indebtedness. The defendant never signed the note and it is not a joint obligation. Bouvier's Law Dictionary defines joint debtors as "two or more persons jointly liable on the same debt." In 2 Words & Phrases, 2d Series, we find a joint obligation defined as "one by which several obligors promise to the obligee to perform the obligation." Plaintiff urges, however, that since the money obtained from Poinsett was expended in paying for family expenses, for which, under our statute, Section 7039, L. O. L., the husband and wife are equally liable, the note must constitute a joint indebtedness.

Holmes v. Page, 19 Or. 232 (23 Pac. 961), was an action against husband and wife, upon an account stated between the plaintiff and the husband. It was sought to hold the wife as a defendant, upon the theory that because the original debt was for family expenses, she was equally liable with her husband, but, as Mr. Justice Lord points out, the action is not based upon the original debt but upon the account stated, with which the wife had nothing to do, and therefore the plaintiff cannot recover.

In *Dale v. Marvin*, 76 Or. 528 (148 Pac. 1116, 1151, Ann. Cas. 1917C, 557), Mr. Chief Justice Moore, commenting upon the doctrine of *Holmes v. Page*, 19 Or. 232 (23 Pac. 961), says:

"A married woman would therefore not be liable on a promissory note executed by her husband to evidence the purchase price of the family expenses. This conclusion repudiates the doctrine promulgated in *Frost v.*

Parker, 65 Iowa, 178 (21 N. W. 507), which case was decided after the enactment of Section 7039, L. O. L., and hence the rule so announced is not controlling in the case at bar. The statute referred to creates, as to the husband and wife, a personal liability which may be enforced in an action at law against them jointly or severally. If both have not joined in executing a promissory note, or assented to the accuracy of an account stated to evidence the value of necessities purchased, a recovery can be had against the spouse who did not join in giving or consenting to such memorandum only upon the original account of the goods sold and delivered."

In the case at bar, the note does not even evidence debts for family expenses, but borrowed money, which plaintiff avers was subsequently expended for family expenses.

Under these authorities cited, we must conclude that the facts stated in the complaint do not permit a recovery. As to whether or not the plaintiff might recover in some other proceeding, we do not decide, for the question is not before us.

The judgment is reversed and the cause remanded to the lower court, with directions to enter an order sustaining the demurrer. REVERSED AND REMANDED,

BURNETT, HARRIS and BEAN, JJ., concur.

Submitted on brief September 2, affirmed September 16, rehearing denied October 14, motion to retax costs denied December 23, 1919.

PORTLAND v. TRAYNOR.

PORTLAND v. KITCHEN.

(183 Pac. 933; 186 Pac. 54.)

Health—Ordinance to Protect Health With No Relation to the Matter Unconstitutional.

1. An ordinance enacted to protect the public health, but which has no real or substantial relation to the subject matter, and is an unreasonable and unwarranted interference with a lawful business, is unconstitutional.

Licenses—Ordinance Giving Officer Arbitrary Powers as to Issuance Invalid.

2. Any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant, is void.

[As to the validity of an ordinance vesting discretion as to its enforcement in a municipal official, see notes in 6 Ann. Cas. 749; 13 Ann. Cas. 652.]

Municipal Corporations—Ordinance Permitting Prohibition of Lawful Occupation Void.

3. An ordinance by or under which an occupation lawful, and not injurious to person, property, or public, when lawfully conducted, may be absolutely prohibited at the dictation of any public official, without just cause or reason, is void.

Licenses—Defense for Operating Soft Drink Establishment Without License Insufficient.

4. The contention that the medical examiners of the city are careless and negligent in the discharge of their duties goes only to the administration and not to the validity of an ordinance requiring, as a condition to issuance of a license, medical examination of persons owning or working in food and soft-drink establishments, and is not a defense to a charge of having violated the ordinance by operating such an establishment without a license.

Municipal Corporations—Ordinance for Licensing Food Establishments Sufficiently Definite.

5. Ordinance of the City of Portland, No. 35,013, providing if the location of a food establishment is found to be suitable, and in proper sanitary condition, according to the ordinances of the city and the regulations of the United States as to plumbing, etc., the bureau of health shall issue a food establishment permit or license to the applicant, is definite and certain, though there is no specification of what shall constitute physical fitness in an applicant for license, or suitability in the location.

[As to grant by city of right to use shops and eating-houses for private purposes, see note in 125 Am. St. Rep. 353.]

Municipal Corporations—City can Provide for Regulating Food and Soft Drink Establishments by Licenses.

6. Under its charter giving the City of Portland power to make regulations to prevent the introduction of contagious diseases, etc., the city had power and authority to adopt its ordinance No. 35,013, providing for the licensing of food and soft-drink establishments on approval of their location, physical examination of the proprietor, and payment of a fee.

[As to the validity of regulations affecting ice-cream, see notes in 41 L. R. A. (N. S.) 150; L. R. A. 1917B, 207]

MOTION TO RETAX COSTS.**Municipal Corporations—City Entitled to Costs in Prosecution for Violation of Ordinance.**

7. Under City of Portland Charter 1903, Sections 332, 333, 336, retained in charter of 1913 as ordinances, and under Sections 2494, 2498, L. O. L., city prosecuting defendants in municipal court for violation of ordinance *held* entitled upon judgment of conviction being affirmed by Circuit and Supreme Courts, to recover from defendants, as costs and expenses, attorney's fees and expenses of brief.

From Multnomah: ROBERT TUCKER and GEORGE W. STAPLETON, Judges.

In Banc.

Inasmuch as the legal questions involved in both cases are very similar, for the purposes of the opinion this and the companion case of *City of Portland v. Catherine Kitchen* will be considered as one. On January 31, 1919, the City of Portland passed Ordinance No. 35,013, entitled "An ordinance amending Article XV $\frac{1}{2}$ of Ordinance No. 34,046 as amended, and repealing Ordinance number 34,800, and declaring an emergency." The first four sections of the ordinance are as follows:

"ARTICLE XV $\frac{1}{2}$.

"Section 1. DEFINITIONS. The term 'food establishment' whenever used in this ordinance shall mean and include every place in the City of Portland where food products are sold or offered for sale or served to the public, or manufactured, produced, concocted, prepared or cooked for the public.

“The term ‘soft drink establishment’ whenever used in this ordinance shall be deemed to mean every place in the City of Portland where drinks are sold, manufactured or served or offered for sale to the public.

“The word ‘person’ whenever used in this Article shall mean any person, firm or corporation, and the masculine pronoun shall include the feminine and the singular number shall include the plural unless otherwise indicated by the text.

“Section 2. LICENSES. It shall be unlawful for any person to open for business, conduct or maintain, or cause to be opened, conducted or maintained, any food establishment or soft drink establishment in the City of Portland without first securing a license therefor as provided by ordinance.

“Section 3. SANITARY CONDITIONS—PERMIT. Any person desiring to secure a food establishment or soft drink establishment license shall make application to the Bureau of Health for inspection of the location where such establishment is intended to be located, which application shall state the exact location of such establishment and the name and address of all persons interested therein, either as owner, proprietor or manager. If, upon investigation such proposed location is found to be suitable for a food establishment or soft drink establishment, as the case may be, and in proper sanitary condition according to the ordinances of the City of Portland and the rules and regulations of the United States with reference to plumbing, water supply, ventilation and cleanliness, the Bureau of Health shall issue to such applicant a permit for such establishment. Such permit shall be presented with the application for a license to conduct such food establishment or soft drink establishment, and no such license shall be issued unless accompanied by such permit.

“Section 4. REVOCATION OF LICENSE. Any license issued hereunder may be revoked for failure to comply with any of the provisions of the ordinances of the City of Portland or the regulations of the United States Government relating to food and soft drink es-

tablishments, and no such license shall be transferable."

Section 5 provides that it shall be unlawful for any individual to be employed or to work in any food establishment without first having obtained a health certificate, or for any employer to hire any individual without such certificate. It is specified that the certificate is to be renewed quarterly and that no certificate more than three months old shall be recognized by any employer. Section 6 of the ordinance is as follows:

"Section 6. EXAMINATION. Any person desiring to secure a certificate of health as herein required shall present himself to the Bureau of Health for examination at least once every three months and if found by said Bureau to be physically fit and free from diseases which are dangerous to the public the Bureau of Health shall issue to such person a certificate of health entitling such person to work in a food establishment or soft drink establishment. Each such applicant for a health certificate shall pay to the Bureau of Health a fee of twenty-five cents for such examination and permit."

The enactment further provides:

"If the bureau of licenses refuses approval of any application it shall at once so notify the applicant in writing and the applicant may appeal to the council within ten days thereafter, and the council shall proceed to hear and determine said appeal and its decision shall be final."

To carry out the provisions of the ordinance the City of Portland was divided into seven districts and inspectors were appointed for each. It was their duty to examine all of the food and soft-drink establishments in the City of Portland, to ascertain whether the owners thereof were complying with the municipal health ordinances in the construction of their buildings and sale of

their merchandise, and in particular to note whether employees coming in contact with soft drinks, groceries, fruit and vegetables with their hands were healthy and free from contagious or infectious diseases. A card-index system was established and after inspection the employees were required to report to the bureau of health and submit to physical examination, for which under the terms of the ordinance a nominal charge was made. If it was found by the inspectors that the premises where the business was to be conducted were sanitary and complied with the ordinances of the city, a license was then granted to conduct the business upon the payment of an annual fee. If upon examination an employee was found to be free from contagious or infectious diseases, a certificate was then issued to him by the bureau of health, authorizing him to handle and sell such merchandise in bulk, as distinguished from canned or carton goods.

The defendant was engaged in conducting a grocery-store in the City of Portland, and refused to obtain a license for his business. A complaint was filed against him in the police court of the city, upon which he was convicted, and appealed to the Circuit Court. In the latter court a jury was waived. The defendant objected to the introduction of any evidence, upon the ground that the complaint did not state facts sufficient to charge a crime; that the ordinance is void for the reason that it is an unnecessary and unwarranted interference with lawful business and violates the provisions of the fifth and fourteenth amendments of the Constitution of the United States and section 20 of Article I of the Constitution of the State of Oregon, in that it grants special immunities and privileges to some, which are not given to all, and confers an arbitrary power upon the city government. The objections

were overruled and the defendant was tried, convicted and sentenced. He appeals to this court.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief submitted by *Mr. J. Le Roy Smith* and *Mr. Wilson T. Hume*.

For respondent there was a brief prepared by *Mr. Walter P. La Roche*, City Attorney, *Mr. E. Y. Lansing* and *Mr. L. E. Latourette*, Deputy City Attorneys.

JOHNS, J.—1-3. We agree with defendant's counsel that an ordinance which is enacted to protect the public health, that has no real or substantial relation to the subject matter and is an unreasonable and unwarranted interference with the conduct of a lawful business, is unconstitutional; that any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession without regard to the qualification of the applicant, is void, and that an ordinance by or under which a lawful occupation, when lawfully conducted is not injurious to the person, property or the public, may be absolutely prohibited at the dictation of any public official without any just cause or reason, is void.

We have carefully read the record and there is no proof of any discrimination by the inspector, or public health officials, of the City of Portland. Indeed, it appears, as a result of inspections, that about 2,500 individuals coming under the provisions of the ordinance have complied with its terms and paid their licenses and that the defendant is the only one who has not. It appears from his own testimony that his chief objection to paying it lies in the fact that he was required to go to the city hall for examination and that he did not

have any particular objection if it could be held in his own place of business.

4. Defendant's contention that the medical examiners are careless and negligent in the discharge of their duties is not supported by the evidence, but assuming that to be true it would go only to the administration and not to the validity of the ordinance and would not be a defense to the charge against him. In the leading case of *Yick Wo v. Hopkins*, 118 U. S. 356 (30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, see, also, Rose's U. S. Notes), upon which appellant relies, it appeared that the petitioner had complied with every requisite of the ordinance and of the officers charged with its administration; that notwithstanding such compliance the supervisors withheld the required license from him and 200 others, similarly situated, and that eighty other and different persons were permitted to carry on the same business under similar conditions.

In construing those ordinances that court says:

"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility."

And the rule is there laid down that—

“Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.” And that “though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

That is good law, but there are no such facts in this record.

In the Yick Wo case the petitioner complied with the ordinance and with 200 others was arbitrarily refused a license by the supervisor. In the instant case 2,500 other business men have complied with the ordinance, paid the fee and obtained their license, and the inspectors have examined defendant's premises and the board of health is ready and willing to grant him a license upon payment of the required fee, which the defendant refuses to pay, but wants to do business without a license.

5. He contends that the “ordinance makes no provision or regulation by which the bureau of health is to be guided in determining in what particular the applicant for license shall be ‘physically fit’ nor what requirements must be met to constitute a grocery store ‘a suitable place,’ ” and cites *Hewitt v. Board of Medical Examiners of the State*, 148 Cal. 590 (84 Pac. 39, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L. R. A. (N. S.) 896). That is a case where the board revoked a license which had been granted and the court held that in legislation providing for the revocation of a

certificate of a person for professional or moral unfitness, the acts or conduct authorizing such forfeiting must be declared with certainty and definiteness and that the acts upon which the board based its decision were not definite and certain. That is not this case. Here, no license had been revoked, and it is only refused because the defendant will not pay the fee, and as we construe it the ordinance in question is certain and definite in its terms. It provides if, upon investigation, the location—

“Is found to be suitable for a food establishment and in proper sanitary condition according to the ordinances of the City of Portland and the regulations of the United States with reference to plumbing, water supply, ventilation and cleanliness, the bureau of health shall issue to such applicant a food establishment permit.”

If the premises comply with the ordinance of the city and the rules and regulations of the government with reference to plumbing, water supply, ventilation and cleanliness, the permit must be granted and the health officer has no right to refuse it. The ordinance of the City of Portland and the rules and regulations of the government in such matters are both definite and certain and the only question which the board of public health has any authority to consider is whether or not the premises or place of business come within such terms and provisions.

The intent is to provide for an inspection of the premises before any business is done and if the inspector makes an unfavorable report the applicant may have the matter further investigated by the city health officer, and if that officer will not grant the permit he still has his remedy by direct appeal to the city commissioners.

It is not within the authority or even the discretion of the bureau of health to grant arbitrarily a permit to one person who has complied with the ordinance, rules and regulations and deny it to another who has complied with them. In the instant case, as to his place of business, there is no claim or pretense on the part of the city that the defendant has not complied with the city ordinance, rules and regulations. The offense consists in his failure and neglect to pay the required license fee, which he admits he had not paid. In *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 (58 L. Ed. 713, 34 Sup. Ct. Rep. 359, see, also, Rose's U. S. Notes), the syllabus recites:

"In determining whether the constitutional rights of a party have been affected by a state statute, the courts will presume, until the contrary is shown, that any administrative body to which power is delegated will act with reasonable regard to property rights."

The purpose and intent of both the City of Portland and the government was to control and to prevent the spread of contagious and infectious disease.

6. Under its charter the City of Portland has the power "to make regulations to prevent the introduction of contagious diseases into the city" and "to secure the protection of persons and property therein, to provide for the health, cleanliness, ornament, peace and good order of the city" and "to exercise within the limits of the City of Portland, all the powers commonly known as Police powers to the same extent as the State of Oregon has or could exercise said power within said limits" and "to make and enforce within the limits of the city all necessary water, local, police and sanitary laws" and the execution of such laws is vested in its board of health and power is also given "to grant licenses with the object of raising

revenue or for regulation or both, for any and all legal acts, things or purposes and to fix by ordinance the amount to be paid therefor, and to provide for the regulation of the same." To do this plenary power is vested under the city charter and the execution of that power is vested in the board of health. In *Lieberman v. Van De Car*, 199 U. S. 552 (50 L. Ed. 305, 26 Sup. Ct. Rep. 144, see, also, *Rose's U. S. Notes*), the rule is laid down:

"A state has the right, in the exercise of the police power, and with a view to protect the public health and welfare, to make reasonable regulations in regard to such occupations as may, if unrestrained, become unsafe, or dangerous, and the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on such a trade or business is not violative of the Fourteenth Amendment. There is no presumption that a power granted to an administrative board will be arbitrarily or improperly exercised, and this court will not interfere with the exercise of such a power where the record does not disclose any ground on which the board acted."

In *State v. Briggs*, 45 Or. 366 (77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424), the rule is stated that in the regulation and licensing of trades, occupations, callings and professions "which affect the public welfare, the legislature must enact the law necessary to accomplish the object in view; but it may be carried into execution by some officer or board appointed for that purpose, and such officer or board may be authorized to prescribe the qualifications of those desiring to follow such callings or professions." In *White v. Holman*, 44 Or. 180, 185 (74 Pac. 933, 1 Ann. Cas. 843), it is said:

"Under a Constitution like ours, any lawful business, the management of which might be injurious to the public, may be regulated so as to limit the place or to prescribe the manner in which it shall be conducted, provided that in doing so no privileges or immunities are granted to any individual or class of persons that shall not equally belong to all citizens upon the same terms."

In *State v. Superior Court*, 103 Wash. 409 (174 Pac. 973), it is held that:

"Laws and ordinances creating boards of health and granting wide powers for the effectual carrying out of legislative plan for protecting health must be liberally construed," and "it is within power of legislature, in dealing with problems of public health, to make determination of fact by properly constituted health officer final and binding on public as well as upon courts."

Under its charter the City of Portland had a legal right to adopt the ordinance here involved. It is not for this court to say whether or not the measure should have been enacted; that is a legislative and not a judicial question. The charter also makes it the duty of the bureau of health to enforce such an ordinance and vests it with power to make the necessary rules and regulations for its enforcement.

There is no evidence that the requirements of the bureau of health are arbitrary or unreasonable, or that there was any discrimination in their enforcement. The judgment in each case is affirmed.

AFFIRMED. REHEARING DENIED.

Motion to retax costs denied December 23, 1919.

MOTION TO RETAX COSTS.

(186 Pac. 54.)

Mr. Wilson T. Hume and *Mr. J. Le Roy Smith*, for the motion.

Mr. Walter P. La Roche, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney, *contra*.

In Banc.

McBRIDE, C. J.—The defendants, upon appeal from the municipal court, were convicted in the Circuit Court of a violation of Ordinance No. 34,046 of the City of Portland, and upon appeal to this court the judgments were affirmed: *Ante*, p. 418 (183 Pac. 933). Thereupon the plaintiff filed its cost bills, consisting of the following items:

Kitchen Appeal.	Traynor Appeal:
Clerk's fee.....\$10	Clerk's fee.....\$10
Attorney's fee..... 15	Attorney's fee..... 15
Brief 27	Brief 56
Total\$52	Total\$81

The item of \$10 clerk's fee in both cost bills was disallowed by the clerk of this court, and the remaining items allowed, whereupon defendants appeal from the decision of the clerk, claiming that under the ordinance of the City of Portland no costs or disbursements are chargeable against any party in a criminal proceeding. We are of the contrary opinion.

By Section 332 of the charter of the City of Portland, passed by the legislature in 1903, and retained in the charter of 1913 as an ordinance, it is provided:

"All proceedings before the court or judge thereof, including all proceedings for the violation of any city ordinance, are governed and regulated by the general laws of the state applicable to the justice of the peace or justices' courts in like or similar cases, except as in this charter otherwise provided. * * "

Section 333 provides:

"All fines, costs, fees and expenses taxed against or received from any defendant in a criminal proceeding before the court or judge thereof, either for the violation of a city ordinance or law of the state, shall, when received or collected, be paid by said judge to the treasurer * * ."

Section 336 provides:

"Except as hereinafter stated, appeals may be taken and shall be allowed from final judgments rendered in the municipal court in all actions, both civil and criminal, under the same circumstances on the same conditions, in the same manner, and with like effect, that, under the laws existing at the time of the rendition of any such judgment, appeals may be taken and shall be allowed from final judgments rendered in similar actions in Justices' Courts. Any defendant who is convicted of any crime defined or created by this charter, or of a violation of any ordinance, rule or regulation of the City of Portland, and is sentenced to any imprisonment or to pay a fine exceeding twenty dollars, may, within five days from the date of such conviction and judgment, appeal to the Circuit Court of Multnomah County, by giving to the city attorney a written notice of appeal and filing an undertaking on appeal, with one or more sureties to be approved by the municipal judge in said municipal court, which undertaking shall be to the effect that such defendant and appellant shall pay *all costs* awarded against him on the appeal and render himself in execution of any judgment rendered against him on the appeal; * * ."

In *Ex parte McGee*, 33 Or. 165 (54 Pac. 1091), it was held in substance that the provision first above

quoted imported into the charter of Portland the mode of procedure provided for Justices' Courts, with certain exceptions not material here. Sections 2494 and 2498, L. O. L., relating to judgments of conviction in Justices' Courts, provide for the recovery of costs from a convicted defendant.

We are of the opinion that by virtue of these provisions, as well as by the provisions of the ordinances above quoted, the material phrases of which we italicize, the respondent is entitled to recover the costs and disbursements taxed by the clerk and his ruling thereon is affirmed.

MOTION TO RETAX COSTS DENIED.

Argued July 10, reargued October 14, reversed and remanded December 23, 1919.

STATE v. RADER.*

(186 Pac. 79.)

Homicide—Attorney's Advice to Deceased.

1. In the absence of evidence showing an attempt to dispossess him of the premises where he was killed, the advice of an attorney given to the decedent about the validity of his tenure is collateral and immaterial.

Refusal of the Defendant to Submit to Arrest.

2, 9. A statement made by the defendant the next day after the homicide to the effect that he would not permit a deputy sheriff to take him and that he was not afraid of the law is incompetent and cannot be used against him, in the absence of showing that he attempted to resist arrest.

Evidence—Impeachment of Witness—Letter Used must be Pertinent.

3, 10. A letter written by a witness and pertinent to the case in hand may be introduced in evidence for the purpose of disclosing the degree of interest the witness has in the result of the trial; but it cannot be used against the defendant for any other purpose unless it is shown to have been written by his authority or consent. If it is not shown to be pertinent to the case it cannot be used in evidence for any purpose.

*On general and common-law rules relating to homicide in the commission of felonies, see note in 63 L. R. A. 354. **REPORTER.**

Homicide—Self-defense—Intent of Assailant not Controlling.

4, 12. It is erroneous to instruct the jury in a homicide case that "if the intention of the assailant is only to commit a trespass, or simple beating it will not justify the killing," because the right of self-defense is not controlled by the intention of the assailant. The assailed may act upon appearances.

[As to homicide in self-defense, see note in 26 Am. Dec. 279.]

Evidence—Inferences.

5. "An inference *must* be founded on a fact legally proved *and* on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of the person whose act is in question, the course of business or the course of nature": L. O. L., § 796. It is error, therefore, to instruct the jury that an inference *may* be founded either on such a fact or in the alternative upon a deduction therefrom.

Homicide—Self-defense—Uncommunicated Threats of Deceased.

6. The decedent's threats of violence against the defendant, although not communicated to the latter, are admissible in evidence to aid the jury in determining who was probably the aggressor in the fatal affray, and on request the defendant is entitled to an instruction informing the jury of this principle.

Homicide—Self-defense—Retreat.

7. A defendant is not bound to retreat from a place where he has a right to be when he is unlawfully assaulted; but may stand his ground and defend himself against the attack.

Homicide—Self-defense Proportionate to Danger.

8. It is essential to the right of self-defense that it be not excessive nor disproportionate to the force actually or apparently involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time under all the circumstances surrounding him.

Evidence—Mental Attitude of Defendant.

11. On his way to the scene of the homicide where he had reason to believe the decedent then was in possession under claim of right the defendant offered to sell to a third party the grass on the land where the decedent then was. This fact was proper for the consideration of the jury in determining the mental attitude of the defendant towards the deceased.

Homicide—Self-defense—Felony—Great Bodily Harm.

13. Violence to the person which amounts to no more than the misdemeanor of simple assault and battery does not justify taking life; but a person is justified in slaying to avert imminent danger of violence amounting to a felony. Violence of the degree of felony is "great bodily harm," but that which amounts only to a misdemeanor is not "great bodily harm." It is not error to charge the jury that "the danger must be that of a threatened felony" before the defendant may kill his assailant in self-defense.

From Grant: DALTON H. BIGGS, Judge.

In Banc.

On an indictment charging him with murder in the second degree by killing E. E. McCue the defendant was convicted of manslaughter and appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Errett Hicks, Mr. John L. Rand* and *Messrs. Winter & Maguire*, with oral arguments by *Mr. John P. Winter* and *Mr. Robert Maguire*.

For the State there was a brief over the names of *Mr. James A. Fee, Mr. George M. Brown*, Attorney General, and *Mr. Phillip Ashford*, District Attorney, with oral arguments by *Mr. Fee* and *Mr. Brown*.

BURNETT, J.—Substantially the facts disclosed by the evidence are these: The defendant is a man about thirty years of age, weighing about one hundred and eighteen pounds. He had ridden on the range after stock since he was a small boy, and had been dragged by a horse, injuring him severely and breaking his ribs. His arm had been broken and one of his legs had been fractured in two places. The deceased McCue was a man described in the testimony as weighing about two hundred pounds, well formed and muscular. The defendant attended to business for his father, who was a stock-raiser and owned the premises where the homicide occurred. It was known as the Johnson ranch and had been leased to a man named Stubblefield, who had assigned the lease or sublet the same to McCue. Contending that the tenant's transfer was void, the senior Rader had been

endeavoring to get McCue off the place and had caused the defendant to serve upon him a notice to quit. No litigation on the subject is revealed by the testimony. In addition to this there was an unsettled account between McCue and Rader respecting the use and occupation of the Johnson place and some witnesses say that McCue admitted owing a balance to Rader, which he promised to pay, without admitting any certain amount. Some time in the autumn of 1917 he had vacated the Johnson place and taken up his residence in Malheur County. On his way, the defendant sought to collect the balance from him and he promised to pay when he returned. He came back in February, 1918, and brought with him some horses to which he intended to feed some hay left on the Johnson place.

On the day of the homicide the defendant was at what is known as the Wright place, some distance northerly from the scene of the tragedy. A neighbor, Mr. Hale, came along on his way to the town of Long Creek, which was still farther south than the Johnson place, and asked the defendant to accompany him to Long Creek, to which the defendant assented. The latter took with him an automatic pistol in the pocket of his chaps, also a rifle which he carried in a scabbard attached to his saddle. Both Hale and the defendant traveled on horseback. Before he reached the Johnson place the defendant dismounted, took the rifle from its scabbard and carried it across the saddle in front of him after remounting. He explains this change of its position by saying that he was afraid of one Guy Lunceford, who was in the immediate vicinity and with whom he had had some trouble before. He explains carrying both firearms by saying

that it had been his habit for several years while riding in the livestock business and that it was customary among range riders in that country to carry firearms for the purpose of shooting wolves and other predatory animals, and that he had been riding after stock within the previous day or two.

On arriving at the house on the Johnson place, a one-room cabin described as being fourteen by sixteen feet in dimensions, he said to Hale in substance that he wanted to see McCue for a moment, and went into the house, carrying the rifle on his arm. After a few minutes he reappeared at the door and invited Hale to dismount and come in to warm himself, as the day was very cold. Hale went in and found the defendant with his rifle still on his arm, and rolling a cigarette. After having been introduced to McCue, the conversation proceeded upon indifferent subjects, without any appearance of anger, until Rader asked McCue, "What are we going to do about this business?" and the latter answered, "I ain't going to do a damn thing about it," took up a pan that was on the stove and slammed it on a bench. At this point Hale, apprehending trouble, left the cabin and mounted his horse. Soon afterward he heard considerable noise as of a struggle in the house, and the defendant called to him for help. Hale at once dismounted, re-entered the house and found that McCue had the defendant prostrate on the floor, face downward, and was "churning" his head upon the floor. Hale intervened by telling McCue to let him have Rader and he would take him away. He says in substance that he was compelled to lift Rader from the floor, grasp him under one arm and place the other over his shoulder and that he had dragged him around and while he was

in a half reclining position in Hale's arms they reached the door, when McCue made a dive at Rader and either struck at him or grabbed at him, saying, "You son-of-a-bitch, I will learn you something!" At this juncture Rader, who had said nothing nor made any demonstration since Hale re-entered the house, fired his pistol twice in quick succession. These shots took effect in the abdomen of McCue. Hale found the rifle lying on the floor. It was not fired during the *melée*. Hale released Rader at the discharge of the pistol and started in pursuit of their saddle-horses, which had run away. On his return he found McCue lying on the bed in the southeast corner of the room. The dying declaration of McCue indicates that he went outside of the house and returned at once to his bed. In this he is corroborated by the defendant.

The defendant's narration of the affray is to the effect that when he went into the house to see McCue there was no ill feeling manifested and nothing hostile occurred until he asked McCue what he was going to do about the business and the latter replied as stated. He says that he had set his rifle down by a small cupboard in the corner and was looking out of the west window when suddenly, without warning, McCue leaped upon him and struck him several severe blows, rendering him at least partially unconscious; that he was engaged in beating him when Rader called to Hale for help, and that it was not until McCue had renewed the attack upon him while he was still in Hale's arms that he fired, taking the pistol from his pocket. Rader and Hale immediately procured help and summoned a surgeon, who operated upon the decedent, but the latter died the following day.

The dying declaration of the decedent is the only other evidence about the details of the fatal affray. As narrated by the surgeon, McCue said:

“‘Fritz [meaning the defendant] came in here hunting trouble, with his gun and I knocked him down trying to get his gun away from him.’ Mr. Hale came in—first—I think he said Hale—he said that—‘Hale was going to take him out so he wouldn’t bother me.’ Fritz began shooting, twice in the house and two or three times outside, he didn’t remember, McCue didn’t remember just how many times he shot outside. ‘He knocked me down and then I think there was two shots.’ One shot outside knocked him down, and then he shot him through the head and arm. I don’t remember just the exact words, but that is as near as I can remember.”

Another witness, Charles Lunceford, attributes these words to McCue in his dying declaration:

“He came in and started trouble. I saw he was going to use his gun, and I hit him and knocked him down and got his gun away from him, and would have got his pistol away and made it all right, but the other fellow came in [and had reference to Hale], and said he would take care of him, and he took him and started out with him, and he shot me twice in the stomach, and I started towards him, and outside I fell, and he shot me in the head and arm after I was down.”

George Baird and Norman Caverhill give substantially the same account of the declaration.

In addition to the wounds in the abdomen there was another in McCue’s right arm, and a fourth through the head from temple to temple. Rader’s account of the wound in the head and arm is substantially that when Hale fled at the beginning of the shooting, the defendant found himself lying on a little platform in front of the door, with McCue bending

over him, whereupon he shot upwards from his recumbent position, inflicting the wounds as stated and that McCue turned around and walked away from the house and called for help, when Rader told him he would help him if he would quit, whereupon McCue returned to the house and laid himself on the bed.

On behalf of the defendant, S. J. Cardwell testified to meeting the decedent driving the horses on his return from Malheur County, and further gave evidence as follows:

"Q. You may state, Mr. Cardwell, what that conversation that you had with him at that time was.

"A. Well, perhaps I couldn't state it all, but then I could state a good part of it, anyway. When we met we passed the time of day and I says, 'You are going back, are you?' 'Yes,' he said, he was coming back, and he said he was coming back over to feed out his hay if it wasn't destroyed. I asked him if he had any pasture and he said no, that the fence was all down, and I asked him if he wasn't afraid to go back down there that way—I don't remember whether I said, with his horses, or just asked him if he was afraid to go back down there that way. He said no, that he had come back to fight them sons-of-bitches the rub, and he said—I don't know just exactly—I think he said there had been one little gun play made, and he said the trouble of it was that—he didn't say Fritz—he said that he always brought some son-of-a-bitch with him when he came.

"Q. Did he say anything about making the smoke fly?

"A. Yes, sir.

"Q. What did he say about that?

"A. He said there had been one little gun play made, and the trouble of it was he always brought some son-of-a-bitch with him. He said that he came up one day, Fritz did, with a pistol around his waist and one on the horn of the saddle, and he said they had quite a set-to. He said he reminded him of a gun that

he had, in their talk, he said he had an envelope that he had laid down or lost it—I think he said laid down—at the farthest end of the stack—I don't know where the stack was at or anything. It had some figures on it, and he said that Fritz put the spurs to his horse when he started after that. I asked him which way he went, from him or towards him. He said, not either, he said he went kind of sideways—or angling—I don't know his words exactly; one or the other. He says, 'The next gun play that is made, the smoke is going to fly.' That is about the words that he said.

"Q. He referred to whom when he referred to them as 'sons-of-bitches'?"

"A. He didn't say who, only in his words, I remember him speaking of Fritz; he said Fritz was a harder man to get along with than George, in some speech, some part of his speech there."

A. T. Meyer narrates a conversation with McCue as follows:

"I told him that I heard Mr. Rader tell Fritz to go down and tell him that he didn't want him on the place. He says, 'Well, if he ever bothers me he will get hurt,' in a very menacing manner."

J. A. Steach stated as a witness that on his return from Malheur County McCue had a conversation with him which the witness reports as follows:

"Then he spoke about coming back, and I understood him to say that the hay was undivided, and he said that he was out at the place and that old George Rader—that is the words he used—had cussed and abused him out at the threshing-machine in the field and he had stood that abuse, but he said he wouldn't stand any more, and he said, if Fritz Rader came onto that place he would kill him."

Another witness, Paul Barr, speaking of McCue, testified thus:

"Well, sir, he said if Fritz Rader tried to drive them horses out of there it would be the last time he would ever drive horses."

It does not appear that any of these threats imputed to McCue were ever communicated to the defendant.

It is assigned as error that Charles Lunceford was permitted to testify that he talked with the defendant just prior to the latter's arrival at the Johnson place and negotiated with him to buy the grass on that ranch and that the defendant first refused but finally said he could have it for \$250. The defendant also complains of a ruling of the court allowing an attorney to testify that he had advised McCue that he had a right to remain on the Johnson place under the transfer from Stubblefield. Another ruling which the defendant attacks is the admission of testimony that the next day after the homicide the defendant had stated he would not permit any deputy sheriff to take him and would not allow any John Carter to be fooling around him, and, further, that he was not afraid of the law.

Mrs. Meyer, the defendant's sister, was called as a witness for the defense to impeach the attending surgeon by relating a statement made by him contrary to his testimony at the trial. On cross-examination she admitted that she was considerably interested in the case because it was that of her brother and that she had been trying to get witnesses to tell the truth. The prosecution then offered a letter written by her under date of May 18, 1918, addressed to Mr. E. Barr, importuning him to come out with a statement and confession on behalf of her brother. After some language urging him in that line, the letter contains this statement:

"If you will do this, the whole country will applaud you and you can give yourself a higher standing than

you have ever had before, and I will say further you will be financially placed above want."

Among others, the court gave to the jury the following instructions:

"Before a person is justified under the law of self-defense in taking the life of another, it must appear, first, that the danger is actually or apparently imminent; and by imminent danger is meant an immediate danger, one that must be instantly met and which cannot be avoided by reasonable efforts to prevent it; and second, the danger must be such that the defendant believes and has good reason to believe that he is in danger of losing his life or of great bodily harm; the danger must be that of a threatened felony. Third, he must use only such force as must be necessary, or honestly appear to him to be necessary at the time, to protect himself from such imminent danger.

"By 'great bodily harm' is meant more than a mere injury by the fist, such as is likely to occur in an ordinary assault and battery. The injury apprehended must be more severe and serious than that usually inflicted in an ordinary fight with the fists, without weapons. Fear of a slight injury is not sufficient. Nor will a mere assault, not felonious, furnish an excuse for the taking of life. If the intention of the assailant is only to commit a trespass or simple beating, it will not justify his killing. But you may consider the relative size and strength of the parties and the ferocity of the attack in determining whether the intended beating, if any, was of such a character as to endanger life or limb, and if so, it will then be felonious and the assaulted person is justified in taking the life of his assailant, if necessary, to preserve his own person or to protect him from such felonious beating.

"Indirect evidence is of two kinds: inference and presumption. An inference is the deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect, and it may be founded on a fact legally proved, or on such a deduction from that fact as is warranted by a con-

sideration of the usual propensities or passions of man, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

The trial judge refused, among others, the following instructions requested by the defendant:

"If you find from the evidence that E. E. McCue, previous to the time he was shot, had made threats to kill the defendant or do him bodily harm, you have the right to take this into consideration, who was the aggressor.

"There has been some testimony in this case tending to show previous threats made by the deceased that were not communicated to the defendant. I instruct you that such threats, if you find there were any, should be considered by you in determining the feeling and intent of the deceased toward the defendant at the time of the encounter and as a circumstance to be considered by you as to whether or not the deceased so acted at the time of the shooting as to induce in the mind of the defendant an honest belief that the said E. E. McCue intended to kill him or do him great bodily harm.

"I instruct you that when a man is where he has a right to be, retreat is not necessary and he is not bound to retreat until his back is at the wall, as is the old saying, but he may stand his ground and repel the attack and meet force with force if necessary, even to the extent of taking the life of his adversary."

1. The matter about Lunceford's endeavor to buy the pasture and the attorney's advice to McCue about the validity of his tenure of the place were collateral matters which should have been avoided, as they neither add to nor take from the guilt of the defendant. There is nothing in the evidence to indicate that the defendant attempted to dispossess the deceased of the premises at the time of the homicide. If the deceased had been a defendant who had slain the pres-

ent defendant while the latter was endeavoring to eject him from the land, he might have shown that he was rightfully there and had reason to believe in the justice of his possession, as tending to show that he was defending his property, but the converse is not necessarily true.

2. In principle, the testimony about the defendant's saying the next day that he would not permit a deputy sheriff to take him, etc., is governed by *State v. Meyers*, 57 Or. 50 (110 Pac. 407, 33 L. R. A. (N. S.) 143). In that instance the defendant had killed a police officer while the latter had him under arrest and in the nature of relating a previous threat made by the defendant, a witness was allowed to say, "He said, 'If they arrested me like that fellow was arrested, I would shoot them,' " alluding to the arrest of another party that had been made previously. The court said:

"It was a casual remark made several months before, and evidently did not refer to deceased. Nor was it shown to have referred to policemen or arresting officers as a class. The evidence was too remote to have any legitimate bearing upon the case at bar. * * The admission of this testimony was highly prejudicial to defendant, and was reversible error."

If in the *Meyers* case it was prejudicial to the defendant to admit a statement of the kind, not alluding to the deceased in person or as a member of a class, although made before the homicide, much more is it prejudicial in the present case to allow such a statement, manifestly not alluding to the decedent and made after the homicide.

3. It was also error to admit the letter written by the defendant's sister to Barr. There is nothing in the language of the letter indicating that it referred

to the present case or that Barr was expected to testify in this litigation. She had admitted her interest and explained the reason. Moreover, there is not a syllable of testimony indicating that the defendant knew about the letter or authorized his sister to write it. In *People v. Dixon*, 94 Cal. 255 (29 Pac. 504), it was set down as harmful to the defendant to allow a witness to testify to acts and declarations of third parties in the absence of the defendant and unauthorized by him in attempting to influence the witness to leave the country so as to avoid testifying in the case. In *State v. Day*, 22 Or. 160 (29 Pac. 352), it was held that:

“Before evidence can be received against a defendant in a criminal prosecution, of attempts to bribe or intimidate a witness for the state, the defendant must be shown to have authorized such attempts or be connected therewith.”

4. See, also: *Brighton v. Miles*, 151 Ala. 479 (44 South. 394); *Owens v. State*, 74 Ala. 401; *Ashcraft v. Commonwealth*, 24 Ky. Law Rep. 488 (68 S. W. 847); *State v. Robinson*, 37 La. Ann. 673; *Commonwealth v. Robbins*, 3 Pick. (Mass.) 63; *People v. Long*, 144 Mich. 585 (108 N. W. 91); *State v. Jaeger*, 66 Mo. 173. Under these authorities it was plainly prejudicial to the defendant even if the letter related to the present case, to allow the jury to hear the unauthorized statements of the sister to the effect that the action of Barr in behalf of her brother would place him financially above want.

More important are the alleged errors respecting the instructions given by the court on the subject of self-defense. In the first of the directions to the jury on that subject which have been quoted, the court charged the jury that the danger apprehended by the

defendant and which he resisted, "must be that of a threatened felony." It is believed that the true rule on this subject is that an individual has the right to defend himself against any unlawful force, using only such opposing force as may be reasonably necessary to repel the attack upon himself; that he is entitled to act not only against real, imminent danger of harm to himself at the hands of an assailant, but that also he has a right to resist what reasonably appears to him, acting as a reasonable man under all the circumstances, to be a present threatened danger, although as the event may prove, the danger may not in fact be actual, and finally that the killing of an assailant will not be justifiable unless, judging of the situation from the standpoint of a reasonable man under all the circumstances surrounding the defendant at the time, he has reasonable cause to believe himself to be in imminent danger of death or great bodily harm at the hands of his assailant. In *State v. Sloan*, 22 Mont. 293 (56 Pac. 364), the defendant and his wife had separated. Her father, described as being heavier and larger in every way than the defendant, who was a small man, met the defendant and after some conversation in the way of demanding the wife's clothes and the defendant's refusal to give them up, the father-in-law struck the defendant in the face with his fist, breaking the skin of his nose, causing the nose to bleed, got him around the neck with one arm and continued beating him in the face. The struggle went on for a few moments, the decedent maintaining his advantage. Thereupon the defendant drew his revolver, which the deceased caught, but it was discharged, inflicting upon the decedent a fatal wound, from which he died in about three hours. The trial court instructed the jury as follows:

"In order to justify the assault, and to slay an assailant, within the meaning of these instructions, there must be an apparent design on the part of such assailant to either take the life of the person assailed, or the infliction of some great bodily injury, amounting to a felony if carried out; and, in addition thereto, there must be imminent danger of such design being accomplished."

Reversing the case and commenting upon this instruction, the Supreme Court said:

"The right of one assaulted to kill his assailant in self-defense should not be limited by his ability to distinguish between felonies and misdemeanors. He must be guided by a reasonable apprehension of death or great bodily harm. And the fear or apprehension of this latter from an unlawful beating at the hands of the assailant may be sufficient when the assault is lacking in some of the elements of felony": See, also, *Ritchey v. People*, 23 Colo. 314 (47 Pac. 272, 384); *McKinney v. Commonwealth* (Ky.), 82 S. W. 263; *State v. Robinson*, 143 La. 543 (78 South. 933).

In *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465), there was evidence tending to show that the decedent was the aggressor and, being a large, powerful man, he struck the defendant a violent blow with his fist and was about to throw him down when the first shot was fired. In commenting upon the phrase, "great bodily harm," the trial judge stated that its meaning was "a felony committed on the person." The Supreme Court of Arkansas, speaking by Mr. Justice RIDDICK, said:

"It means a 'great bodily injury' as distinguished from one that is slight or moderate, such as would ordinarily be an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault something more than an attack with the hand or fist would usually be re-

quired, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such an extreme severity as to produce great bodily injury and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances; but, as such an injury may, under some circumstances, be committed, and still the offender not be guilty of a felony, it is therefore not accurate to define 'great bodily injury' as 'a felony committed on the person.' What constitutes a great bodily injury and whether the circumstances in any case are such as to justify one in believing that such an injury is about to be committed upon him, and in defending himself against it, are matters which must be left, to a great extent, to the judgment of the jury."

In *State v. Keasling*, 74 Iowa, 528 (38 N. W. 397), the jury had been directed respecting self-defense that:

"Under it the right to take life or to resort to the use of a deadly weapon in the resistance of an assault is made to depend upon whether the assault is * * felonious and the danger actual and urgent."

This was held to be erroneous. In *State v. Clark*, 134 N. C. 698 (47 S. E. 36), the trial court had added to the defendant's requested charge the proviso that the assault made upon the defendant was felonious or with felonious intent. The court, holding this to be error, said:

"But the addition to the defendant's prayer for instructions was in itself erroneous. It was not necessary that the assault upon the defendant should have been felonious or committed with a felonious intent."

State v. Bowling, 3 Tenn. Cas. 110, is one the facts of which are almost identical with the one at bar. The court said:

"The means by which the great bodily violence is being threatened or inflicted, whether by the use or threatened use of weapons or by the overpowering strength of a stronger man, can make no difference; it is the fact of such violence, real and threatened, that gives the right of self-defense. Where such fact of real violence is found, and the party certainly exposed to it, or honestly believes himself so, then the right to defend against it is an essential element of every free man involved in the proposition that every man is entitled to enjoy life and liberty."

The court in reversing and remanding the case said:

"The fact that the verdict of the jury rebuts the idea of malice, and the proof leads to the same conclusion, leaves the case to stand solely upon the rights of the party to kill to prevent actual violence of the severest character short of death, when inflicted by the blows of a fearful adversary whose strength he was unable to resist in a struggle. We cannot say he was criminal in freeing himself from such violence by the only means in his reach."

In *State v. Bartlett*, 170 Mo. 658 (71 S. W. 148, 59 L. R. A. 756), the decedent, who was greatly superior in strength to the defendant, undertook to whip him publicly. After commenting upon the precedents on self-defense, the court, speaking by Mr. Justice SHERWOOD, used this language:

"But nothing above asserted is intended to convey the idea that one man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horse-whipping. We hold it a necessary self-defense to resist, resent and prevent such humiliating indignity,—such a violation of the

sacredness of one's person,—and that if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity.”

In *State v. Gray*, 43 Or. 446 (74 Pac. 927), the defendant was going along the county road adjoining the premises of the decedent. The latter hailed him and after a quarrel had ensued jumped over the fence, removed his coat and advanced toward the defendant in a menacing attitude, with threats to take away from the defendant a pistol which he had drawn and beat out his brains with it. In the scuffle which took place the pistol was discharged, inflicting a fatal wound. The decedent was much the superior of the defendant in physical strength, but had no weapon. The court instructed the jury as follows:

“But such right of self-defense as will justify the taking of the life of the assailant can only be exercised to defend his life or defend his person from great bodily harm. But danger of a battery alone will not be sufficient to justify taking the life of his assailant.”

The trial court refused to give the following instruction requested by the defendant:

“It is not necessary that the assault made by the deceased at the time upon the defendant Wilson Gray, if you find that an assault was made, should have been made with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant, Wilson Gray, is sufficient to justify the killing in self-defense, if the defendant Wilson Gray, at the time he shot and killed the deceased, had reason to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased.”

This court, speaking by Mr. Justice WOLVERTON, held that it was error to refuse the requested instruction, and among other things said:

“Retreat or avoidance of further conflict to prevent the taking of human life is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent. Where, however, the assault is attended with such demonstration, and the present ability to execute it, whether the assailant is armed with a deadly weapon or not, as to indicate to the assailed, acting reasonably upon appearances, that he is in imminent danger of being beaten and maltreated, and probably disfigured or maimed, or his life imperiled, he has a right to withstand the assault, even to the taking of the life of the aggressor.

“No person has a right to advance into a public highway and administer a merciless castigation upon his neighbor who is lawfully there; nor does the law require that a person, when so assailed, shall stop to inquire to what extreme his aggressor will push the attack, but may act at once upon appearances, and resist it with such force as will effectually repel it. A strong, powerful man, with his fists alone is capable of visiting great physical injury upon his victim much his inferior in strength or endurance, and he may even thus take his life. Instances are not wanting where such results have followed. * * And the question as to the degree of danger attending the assault is one for the jury; they putting themselves in the place of the assailed, and acting as reasonable men upon the conditions as they appear to have existed.”

The second instruction on self-defense quoted above is an adaptation of language used by Mr. Chief Justice BEAN in *State v. Doherty*, 52 Or. 591 (98 Pac. 152). In that case the defendant had treated some men, including the decedent, in a saloon. He requested the latter to treat the crowd, which the decedent did and began to make preparations to go home.

The defendant then demanded that he treat the crowd again and on his refusal began abusing Allen, the decedent, applying various opprobrious epithets to him, when Allen got him by the throat and pushed him into the corner of the room, but did not attempt to strike him. After Allen had left the defendant and walked away at the request of the bartender, the defendant followed him up, still repeating his abuse, despite Allen's request for him not to ask him to buy any more drinks. The defendant thereupon repeated his request, when Allen struck at him, and at that point the defendant drew his pistol, firing five shots at Allen, some of which took effect, killing him in a few minutes. There it was plain, beyond question, that the defendant was the aggressor from the beginning and that no more than a mere assault had been committed up to the moment of the shooting.

With respect to such a case this language of the court was used in commenting upon the Doherty case. That instance is essentially different from the present. The authorities cited in support of the assertion of the opinion that "if the intention of the assailant is only to commit a trespass or simple beating, it would not justify the killing," do not sustain the text. For instance, in *Floyd v. State*, 36 Ga. 91 (91 Am. Dec. 760), the Supreme Court of Georgia expressly placed its decision on the ground that—

"It does not appear by the record that there was great superiority in physical strength on the part of the assailant over that possessed by Floyd, nor it appearing that Floyd was in ill health at the time, nor other circumstances existing at the time which produced relatively great inequality between them for sudden combat, we are not able to find any fact in the case which would justify him in repelling the blow with the fist by the use of his knife."

And in the other case cited supporting the doctrine of intention, *State v. Benham*, 23 Iowa, 159 (92 Am. Dec. 417), the court does not, as in the Doherty case, hold the defendant responsible for the intention of the assailant without qualification, but says:

“The physical capacity of the two persons would be an important consideration for the jury in determining the question whether the defendant in what he did was within the law of necessary self-defense. So the size and character of the ox-goad or weapon which the deceased seized or had, the manner in which he threatened to use it and the manner in which he entered upon the execution of that threat, would also be important considerations for the jury. Now, none of these circumstances are in any manner alluded to in the charge of the court. The attention of the jury should have been called to these circumstances,—that is to say, to the nature and character of the advance of the deceased upon the defendant. And the jury should have been directed to ascertain whether all the circumstances in evidence denoted or showed an intention on the part of Sheppard to take the life of Benham or to do him some enormous, some dreadful bodily harm; if they did, then Benham in self-defense might lawfully take the life of his assailant, provided he used all the means in his power otherwise to save his own life or prevent the intended harm.”

As to the intent of his assailant, the defendant is affected not by what his actual intent was, but, as pointed out in the Benham case, by what the circumstances indicated was the intent. The instruction is erroneous in the same respect as the first one quoted, in stating that the beating, if it endangered life or limb, was felonious. This might or might not have been true, according to the circumstances of the case, and we can easily conceive of cases where great bodily harm could be inflicted without laying the assailant

liable to a charge of felony. The question of whether there was a real or apparent danger to the defendant of death or great bodily harm, is one of fact for the jury. The defendant is not bound at his peril to divine the intent of his assailant and determine at his peril whether he has a felonious purpose or whether the assault committed would turn out to be a felonious one. He is entitled to protect himself against death or great bodily harm, whether that great bodily harm be felonious or otherwise. When the court assumes to apportion the amount of real or threatened danger, it invades the province of the jury. It is not intended to say that a defendant may in all cases resort to homicide to protect himself against injury, for it is well settled and reasonable that defense is not to be used as an instrument of vengeance and must not be disproportionate to the real or threatened danger. But whether the threatened or inflicted injury is felonious or not, whether it be inflicted by the use of weapons or by the hands or feet of one superior in strength, if it amounts to great bodily harm in the estimation of the jury, the latter would have a right to justify the application of sufficient force by the defendant to repel the danger, and if in reason it is apparently necessary to go to the extreme of homicide, the defendant is entitled to be acquitted.

In *Hill v. State*, 94 Miss. 391 (49 South. 145), the court had instructed the jury that:

"The words 'great bodily harm,' in contemplation of law do not mean such bodily harm as might have been inflicted by mere blows with the hands or feet."

The defendant had requested instructions to the effect that if deceased was physically capable of inflicting great bodily harm upon the defendant with his

hands or feet, and the defendant had reason to believe, and did believe, that the decedent was about to inflict such an injury upon him, and under such belief fired the fatal shot to protect himself from such harm, then it is immaterial whether the deceased was armed or not at the time of the killing. But the requested instruction was refused. After laying down the rule in substance that where two combatants are equally matched and the attack does not furnish the defendant with reasonable grounds to apprehend danger to his life, or the inflicting of great bodily harm, the opinion goes on to say:

“But the trouble with this instruction * * for the jury is that it tells the jury, without qualification or modification of any kind, that the great bodily harm which the law contemplates never can be, under any circumstances, such as may be inflicted by mere blows with the hands or feet. This is palpably erroneous. There may be many cases in which the disparity between the combatants is so overwhelming that the one of superior physical power may inflict great bodily harm, or death itself, by mere blows with the hands or feet.”

In the present case there is evidence to the effect that the decedent had knocked down the defendant and had beaten him so that Hale was compelled to lift him to his feet; that without resistance he was being taken out of the house by Hale and that under these conditions, without any hostile demonstration on the part of the defendant, McCue again attacked him, when the fatal shots were fired. Although many expressions have been used to the effect that a man rightfully may defend himself against a felonious attack, yet it is not reasonable or just to say that the attack must in all cases be a felonious one before the defendant is allowed to repel it with sufficient force

to prevent not only danger to his life but also great bodily harm, irrespective of whether the latter is effected by felonious means or not. Assault and battery is not a felony in this state: Laws 1911, Chap. 133. Yet all must agree that a strong, muscular man may inflict great bodily harm upon a weak or crippled one without being guilty of more than the misdemeanor defined in that statute. A felony is composed of two elements: the unlawful act, and the felonious intent. It is not the intent of the assailant which harms the one he attacks, neither is the latter bound by it nor required to ascertain it. He may repel the force employed against him, irrespective of the intent of his adversary, whether the latter discloses it or not. It is the imminent danger, real or apparent, of great bodily harm to himself which justifies a defendant in protecting himself. The intent of the other party may be felonious or not, but it is not controlling. The weak man's body, shattered though it may be by accident or disease, is his own and the law does not require him to submit to a severe beating likely to maim him or permanently injure him, at the hands of a powerful and greatly superior antagonist, all because the weak man cannot hold his own and the threatened injury will not be felonious but only a misdemeanor.

5. The language of the court about indirect evidence does not comply with our own statute on the subject as laid down in Section 796, L. O. L., in that the instruction says the inference *may* (not *must*) be founded upon a fact legally proved, and further going on in the alternative says that the inference *may* be founded upon such a deduction from that fact as is warranted by a consideration of the usual propensities and passions of man, etc., whereas the Code requires

the inference to be founded not only upon a fact legally proved, but also, and not in the alternative, upon the deduction mentioned.

6. The court gave no instructions to the jury whatever respecting the uncommunicated threats delineated in the testimony, besides refusing those requested by the defendant, as above quoted. In *State v. Tarter*, 26 Or. 38 (37 Pac. 53), Mr. Chief Justice LORD wrote:

"Where the circumstances raise a question of self-defense, evidence of uncommunicated threats recently made is admissible for the purpose of showing the motive of the deceased, and the nature and character of the assault. So, also, proof of threats not communicated is often admitted for the purpose of corroborating evidence of those communicated; and, likewise, where it is doubtful from the evidence which party commenced the affray, communicated threats are admissible to show who was probably the first assailant."

State v. Quen, 48 Or. 347 (86 Pac. 791), was a case relating to threats, and Mr. Justice MOORE declared that:

"Evidence of such threats, when recently made, or when so connected as to form a chain of menaces, evincing a present purpose, is admissible in doubtful cases to illustrate what may be deemed the reasonable actions of participants in an encounter, for the purpose of showing the *quo animo* of the person making the threats and thereby increasing the probabilities that he was the aggressor at the time of the conflict." (Citing authorities.)

See, also, *State v. Doris*, 51 Or. 136 (94 Pac. 44, 16 L. R. A. (N. S.) 660), and *State v. Parker*, 60 Or. 219 (108 Pac. 1011).

Although one of the requests is subject to verbal criticism respecting the words "tending to show," yet

the defendant was entitled to instructions respecting the purpose for which the evidence of threats was admitted. It would be extremely technical utterly to omit all reference to a phase of the case so important as this because of so slight a variance from exact legal statement.

7. Under the authority of *State v. Gray*, 43 Or. 446 (74 Pac. 927), the last of the requested instructions above quoted respecting the doctrine of retreat when a man is where he has a right to be, should have been given. Some of the requests to charge, not here quoted, leave out of view the element that the extreme of killing must be apparently necessary as a defense.

8. It is essential that the defense must not be excessive or disproportionate to the force involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time, under all the circumstances surrounding him.

The trial of the case was characterized and the record burdened by investigation of several collateral matters unnecessary to a proper consideration of the case. It is believed that on a retrial the proceedings will be controlled within reasonable limits, for it is said in Section 725, L. O. L., that collateral questions shall be avoided.

On account of the errors mentioned the defendant is entitled to a new trial, and it is so ordered.

REVERSED AND REMANDED.

JOHNS, J., concurs in the result of this opinion.

HARRIS, J.—Although I cannot concur in all the views expressed by Mr. Justice BURNETT, yet I do concur in his conclusions that prejudicial errors affecting substantial rights of the accused occurred

during the trial, and that the judgment, from which the defendant appealed, must be reversed and a new trial granted. A statement of the facts may be found in the opinion written by Mr. Justice BURNETT.

9. The testimony of W. S. Caverhill about the defendant's saying that "no deputy sheriff would take him, he wouldn't allow any John Carter to be fooling around him"; and that, "he wasn't afraid of the law," is, in the circumstances shown by this record, manifestly incompetent. There are many cases where statements made subsequent to a homicide are received in evidence as part of the *res gestae*; and there is a class of cases where hostile declarations made after the killing are admissible for the purpose of showing the state of the accused's mind toward the decedent: *State v. Brown*, 28 Or. 147, 158 (41 Pac. 1042); 21 Cyc. 898. The defendant requested Norman Caverhill to notify the sheriff of what had occurred and if the officer wished, the defendant would go to Canyon City, the county seat, or if the sheriff, "thought necessary he could come over after the defendant." The sheriff came to Long Creek, which is but a short distance from the scene of the homicide, and the defendant surrendered himself to the sheriff at that place. At no time did the defendant defy arrest. Immediately after the shooting Rader went to the home of Earl Caverhill, told of what had occurred and suggested that "one fellow better go for a doctor." The defendant returned to the house where McCue was, and, according to the evidence, took some part in caring for McCue until the time of his death. The allusion to the deputy sheriff was prompted by the circumstance that Joe Wilmoth and John Carter "were deputies over there." Defendant "didn't want to come with them" because of some bad feeling be-

tween him and them. If the defendant had defied anyone to arrest him, or if he had resisted arrest, quite a different situation would have been presented. The accused never at any time said or indicated that he could not be or would not be arrested; but, upon the contrary, he took active steps to notify the sheriff and expressed a willingness to go to the sheriff or await his arrival. On the record presented here the testimony of W. S. Caverhill was not competent, and its only possible effect was to create a pronounced prejudice against the defendant.

10. The letter written by Jean Meyer was not made to appear competent. It was proper to show upon cross-examination that this witness was interested in the outcome of the trial; and if the letter related to the case now under consideration, it was competent for the plaintiff to show that fact, not as evidence against the defendant, but for the purpose of disclosing the extent of the interest manifested by the witness: *State v. McCann*, 43 Or. 158 (72 Pac. 137); *State v. Lem Woon*, 57 Or. 482, 489 (107 Pac. 974, 112 Pac. 427). There is not a syllable of evidence indicating that the letter related to the case then on trial; but, upon the contrary, every word of affirmative testimony is to the effect that the letter did not relate to "this case." The following questions were asked and answers given by the witness:

"Q. Did you write any letters in connection with it?

"A. None whatever.

"Q. Positive of that as any statement you have made in this case, now?

"A. Well, I don't know of any letters I have ever written to anyone.

"Q. Didn't you offer in writing to see that a man was properly financed if he would come here as a witness?

"A. Not to that effect, no, sir.

"Q. Nothing to that effect?

"A. No, sir, not in this case."

The trial began on May 29, 1918, and the letter was dated May 18, 1918. It is entirely clear from the record that the witness was aware of the fact that the cross-examiner was in possession of the letter even though we assume that she had not yet seen it in his hands; and it is likewise clear that she had not forgotten the contents of the letter which she had written only a few days previously; and, hence, so far as her testimony is concerned, it is unequivocally and affirmatively to the effect that the letter did not relate to "this case." Aside from the testimony of Jean Meyer there is no evidence whatever upon the subject except inferences to be drawn from the letter itself. E. Barr, the person to whom the letter was addressed, for aught that appears in the record, was neither called nor subpoenaed as a witness by either party; nor does it appear that he had knowledge of any fact which would have been competent as evidence in the case. Moreover there is no evidence to show that Jean Meyer thought or feared that E. Barr would or might be a witness in "this case." One might speculate about the purpose of the letter, but the result would be a mere guess. If the letter did in truth relate to "this case," the prosecution might be entitled to it as evidence affecting the interest of the witness and for that purpose only; and even then fairness to the accused would suggest that the court explain to the jury the purpose of the evidence and the limitations which must be placed upon it. If, on the other hand, the letter did not in truth relate to "this case," the prejudicial effect of the letter is so manifest that argument about it becomes wasteful excess. Before the prosecution can rightfully submit the letter to the jury there must be

some evidence showing that the writing relates to "this case." The record presented to us is wanting in this respect.

The testimony of the lawyer concerning the advice given by him to the decedent was incompetent.

11. In the opinion of the writer the testimony of Charles Lunceford was competent. The conversation between this witness and the defendant occurred while the latter was on his way to the Johnson place. The defendant offered to sell the grass on that place for a specified sum. There was evidence from which the jury could infer that the defendant knew that McCue was at that very moment in possession of the Johnson place. The conversation with Lunceford characterized the mental attitude of the defendant. It was competent for the jury to consider all that was said by the defendant in this conversation for the purpose of determining the mental attitude of the defendant towards McCue. No living person, except the defendant, saw what occurred in the cabin during the interim between Hale's first departure from the cabin and his return when he found the defendant "churning" the defendant's head upon the floor. It was for the jury to decide who was the aggressor, and in order that the jurors might properly decide that question, it was proper for them to consider the mental attitude of the defendant.

12. Instruction No. 19 was as follows:

"By 'great bodily harm' is meant more than a mere injury by the fist such as is likely to occur in an ordinary assault and battery. The injury apprehended must be more severe and serious than that usually inflicted in an ordinary fight with the fists, without weapons. Fear of a slight injury is not sufficient. Nor will a mere assault, not felonious, furnish an excuse for the taking of life. If the intention of the assailant is only to commit a trespass or simple beat-

ing, it will not justify his killing. But you may consider the relative size and strength of the parties and the ferocity of the attack in determining whether the intended beating, if any, was of such a character as to endanger life or limb, and if so, it will then be felonious and the assaulted person is justified in taking the life of his assailant, if necessary, to preserve his own person or to protect him from such felonious beating."

It will be observed that the court told the jury that "if the *intention* of the assailant is only to commit a trespass or simple beating, it will not justify his killing"; and then the court informed the jurors that they could consider the relative size and strength of the parties and the ferocity of the attack in determining whether "the *intended* beating" was of such a character as to injure life or limb. The right of self-defense is not controlled by the intention of the assailant, for the assailed may act upon appearances. This rule is hornbook law in this jurisdiction. Obviously, the instruction was error, for by that instruction the jury was told:

"If the intention of the assailant is only to commit a trespass or simple beating, it will not justify the killing."

There were other instructions, it is true, which correctly told the jury that the defendant had a right to act upon appearances.

We have then for consideration a charge containing correct and also incorrect instructions. The charge to the jury must of course be read as a whole; but when the instructions are so read, the correct instructions cannot be said to have cured the incorrect instructions. In the very nature of things instruction No. 19 is one of the instructions which the jury undoubtedly understood and remembered. All the direct evidence is to

the effect that the decedent used his hands only in making any assault that he may have made upon the defendant; and, hence, when the court gave instruction No. 19 we must reasonably assume that every juror instantly made a mental application of the instruction to the concrete facts of the alleged assault. The very circumstances of the assault which the defendant claimed was made upon him by the decedent served to emphasize and give prominence and individuality to instruction No. 19. On the other hand, correct instructions relating to self-defense were couched in general and comprehensive language; and, as it seems to the writer from an examination of the record, there was nothing to give to any of these correct instructions the same degree of emphasis as was given to instruction No. 19 by the peculiar circumstances of the alleged assault. If the jury followed instruction No. 19, a substantial right of the defendant was prejudiced. If the jury obeyed the correct instructions, the accused was not injured. It is not known, nor can it be ascertained, whether the verdict was based upon the erroneous or upon the correct portions of the charge. The instructions are in direct conflict and are so disconnected in context "that they cannot be read together as a harmonious and correct statement of the principle of law involved": *State v. Miller*, 43 Or. 325, 333 (74 Pac. 658, 660).

The defendant vigorously contends that the right of self-defense is not limited to the prevention of a felony actually or apparently about to be committed upon the slayer. This question raised by the defendant cannot here be said to be merely academic as it was in *State v. Butler*, (Or.), 186 Pac. 55, for here the instructions to the jury and the recorded evidence necessarily require a solution of the problem. In instruc-

tion No. 15 the court told the jury that the statute of this state provides that "the killing of a human being is justifiable when committed by any person to prevent the commission of a felony upon him." Again, after instructing the jury that "before a person is justified under this law of self-defense in taking the life of another, it must appear" that the danger is actually or apparently imminent and must be such that the assailed believes, and has good reason to believe, "that he is in danger of losing his life or of great bodily harm; the danger must be that of a threatened felony."

13. Throughout the discussion we must bear in mind that there are no indictable common-law offenses in this state. We must look to our statutes for the crimes themselves, although when necessary we may look to the common law for definitions of crimes: *State v. Gaunt*, 13 Or. 115, 120 (9 Pac. 55); *State v. Ausplund*, 86 Or. 121, 131 (167 Pac. 1019).

The Code defines murder in the first degree, murder in the second degree and manslaughter. The term "manslaughter" includes five specified classes of cases of homicide; as, a voluntary killing without malice and without deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible; an involuntary killing in the commission of an unlawful act or a lawful act without due caution or circumspection; assisting another to commit self-murder or purposely and deliberately procuring another to commit suicide; death caused by an unlawful abortion; and an involuntary killing of a patient by an intoxicated physician. The next section of the Code, Section 1902, L. O. L., declares that:

"Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree,

or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter."

If, therefore, a killing "is not justifiable or excusable as provided in this chapter," the inescapable result is that the killing must be culpable, because, if not murder in the first or second degree and even though not coming within any one of the five specified classes of manslaughter, a homicide is inevitably manslaughter by force of the words "every other killing * * by the act * * of another," in Section 1902, L. O. L.

We are nowise concerned in the common-law distinctions between justifiable and excusable homicide, for the present inquiry is not dependent upon any of those differences. Sections 1908, 1909 and 1910, L. O. L., are the sections "in this chapter" which enumerate the cases of justifiable and excusable homicide. Section 1908 may be eliminated, since it applies only to a killing when committed by public officers or those acting in their aid and assistance and by their command in either of four specified classes of cases. Section 1910 may also be excluded from the discussion, for it excuses certain cases of homicide resulting from accident or misfortune. Section 1909, the remaining section, is the only one which is relevant to the present investigation and for that reason it is here transcribed in full:

"The killing of a human being is also justifiable when committed by any person as follows:

"1. To prevent the commission of a felony upon such person or upon his or her husband, wife, parent, child, master, mistress, or servant;

"2. To prevent the commission of a felony upon the property of such person, or upon property in his possession, or upon or in any dwelling house where such person may be;

"3. In the attempt, by lawful ways and means, to arrest a person who has committed a felony or in the

lawful attempt to suppress a riot or preserve the peace."

8. The only portions of Section 1909 which can anywise be material to our inquiry are subdivision 1 and the words "or upon or in any dwelling-house where such person may be." But whether the third or both these portions are applicable, the result is the same, because each declares that a homicide is justifiable when committed to prevent the commission of a felony; and this is one way of saying that homicide when done to prevent the commission of a misdemeanor is at least manslaughter, because if the killing does not fall within one of the sections defining murder or within any one of the five sections specifically defining manslaughter, it is irresistibly drawn within the embrace of Section 1902, L. O. L.; and, therefore, unless Section 1909 is invalid, it is correct to instruct a jury that the danger whether actual or reasonably apprehended, "must be that of a threatened felony."

The Code divides crimes into felonies and misdemeanors: Section 1370, L. O. L. There is no middle ground; no third class of crimes. Every criminal act of violence is either a felony or misdemeanor. Any act, if made criminal at all by our Code, is necessarily a felony or a misdemeanor. All crimes which are punishable with death or by imprisonment in the penitentiary are felonies, while "every other crime is a misdemeanor": Sections 1371 and 1372, L. O. L. When the legislature used the word "felony" in Section 1909, L. O. L., it necessarily meant the offense defined in Section 1371, L. O. L., for that section contains the only definition of the term found in the Code: *Ex parte Biggs*, 52 Or. 433, 435 (97 Pac. 713).

If alternative penalties for a crime are provided for, so that the offender may either be committed to the

penitentiary, or, in the discretion of the trial judge, be sentenced to pay a fine or serve time in the county jail, the offense is nevertheless deemed to be a felony until and unless the penalty actually imposed is other than imprisonment in the penitentiary; but if the penalty actually imposed is other than imprisonment in the penitentiary, the crime is deemed a misdemeanor after the judgment prescribing the penalty: Section 1371, L. O. L.; *Turner v. State*; 40 Ala. 21, 29; *State v. Waller*, 43 Ark. 381, 388; *People v. War*, 20 Cal. 117, 119; *Müller v. State*, 58 Ga. 200, 203; *In re Stevens*, 52 Kan. 56, 60 (34 Pac. 459); *State ex rel. v. Foster*, 187 Mo. 590, 603 (86 S. W. 245); *People v. Hughes*, 137 N. Y. 29, 34 (32 N. E. 1105); *People v. Van Steeansburgh*, 1 Parker Cr. (N. Y.) 39, 45; *McKelvy v. State*, 87 Ohio St. 1, 7 (99 N. E. 1076); *Quillian v. Commonwealth*, 105 Va. 874, 882 (54 S. E. 333, 8 Ann. Cas. 818); *State v. Harr*, 38 W. Va. 58, 65 (17 S. E. 794). When, therefore, life is taken to prevent an offense which, if committed, may be punished by imprisonment in the penitentiary, the slayer prevents the commission of a "felony" within the meaning of Section 1909, even though for such offense there is a lesser alternative penalty.

The defendant argues that the right of self-defense is not limited to the prevention of a felony, but that it extends to all cases where it is necessary to prevent death or great bodily harm. This is another way of saying that a person may slay to prevent the commission of an act which would, if consummated, produce great bodily harm, regardless of whether such consummated act is or is not a felony.

Although the words "great bodily harm" do not constitute the only language of the books, yet their frequent appearance has placed them among the familiar

words of text-writers and jurists. The reported opinions of this court show that the words "great bodily harm" have been a part of the vocabulary of nearly every, if not every, member of this tribunal who has written upon the subject of self-defense: *Goodall v. State*, 1 Or. 334, 337 (80 Am. Dec. 396); *State v. Dodson*, 4 Or. 65, 70; *State v. Morey*, 25 Or. 241, 250 (35 Pac. 655, 36 Pac. 573); *State v. Tarter*, 26 Or. 38, 42 (37 Pac. 53); *State v. Henderson*, 24 Or. 100, 105 (32 Pac. 1030); *State v. Porter*, 32 Or. 135, 154 (49 Pac. 964); *State v. Bartmess*, 33 Or. 110, 125 (54 Pac. 167); *State v. Smith*, 43 Or. 109, 117 (71 Pac. 973); *State v. Gibson*, 43 Or. 184, 192 (73 Pac. 333); *State v. Miller*, 43 Or. 325, 332 (74 Pac. 658); *State v. Gray*, 43 Or. 446, 454 (74 Pac. 927); *State v. Thompson*, 49 Or. 46, 49 (88 Pac. 583, 124 Am. St. Rep. 1015); *State v. Remington*, 50 Or. 99, 110 (91 Pac. 473); *State v. Doris*, 51 Or. 136, 157, 165 (94 Pac. 44, 16 L. R. A. (N. S.) 660); *State v. Doherty*, 52 Or. 591, 594 (98 Pac. 152); *State v. Finch*, 54 Or. 482, 495 (103 Pac. 505); *State v. Goodager*, 56 Or. 198, 201 (106 Pac. 638, 108 Pac. 185); *State v. Ryan*, 56 Or. 524, 536 (108 Pac. 1009); *State v. Meyers*, 57 Or. 50, 56 (110 Pac. 407, 33 L. R. A. (N. S.) 143).

The word "felony" is likewise a part of the language of the books, for since the time slaying in self-defense was recognized by the common law as a right, every writer and jurist who has discussed the subject in the light of the common law has inseparably connected the term "felony" with the right of self-defense.

Nearly two centuries ago Sir Michael Foster wrote as follows:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to

commit a known felony upon either": Foster's Crown Cases, 273.

The words "known felony" are designedly used for the purpose of excluding secret felonies. Again, the same writer, when speaking of a killing in a mutual conflict, said:

"He therefore who, in the case of a mutual conflict, would excuse himself upon the foot of self-defense must show, that before a mortal stroke given he had declined any further combat and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid *immediate death*. If he faileth in either of these circumstances he will incur the penalties of manslaughter": Foster's Crown Cases, 277.

See, also, 1 Hawk. P. C. 82; 1 Hale's P. C. 482-488; Wharton on Homicide (3 ed.), 361; 2 Cooley's Blackstone (3 ed.), 282 (Book IV, 180).

In his discourse on homicide Sir Michael Foster also wrote as follows:

"The right of self-defense in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society; for before civil societies were formed, (one may conceive of such a state of things though it is difficult to fix the period when civil societies were formed,) I say before societies were formed for mutual defense and preservation, the right of self-defense resided in individuals; it could not reside elsewhere; and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature": Foster's Crown Cases, 273.

The same thought is expressed by Blackstone as follows:

"Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society": 2 Cooley's Blackstone, 3 (Book III, 4).

This doctrine has been repeated with such frequency that it has come to be almost an axiom of the law: *Isaacs v. State*, 25 Tex. 174, 177; *Long v. State*, 52 Miss. 23, 28; *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478 (23 Am. Dec. 431, 436); Wharton on Homicide (3 ed.), 354; *United States v. Custerbridge*, 5 Sawy. 620, 623 (Fed. Cas. No. 15,978); 1 Michie on Homicide, 322; *Young v. State*, 53 Tex. Cr. App. 416 (110 S. W. 445, 447, 126 Am. St. Rep. 792); *Lander v. State*, 12 Tex. 462, 476; *Parrish v. Commonwealth*, 81 Va. 1, 12; *State v. Tarter*, 26 Or. 38, 43 (37 Pac. 53); *State v. Ryan*, 56 Or. 524, 536 (108 Pac. 1009).

While it is true that it has been said that "society may curtail this right" of self-defense "and no doubt does restrain its exercise in many important particulars": *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478 (23 Am. Dec. 431, 437); 13 R. C. L. 810; yet at this stage of the discussion we are not so much interested in determining whether society can curtail the right of self-defense, or in the extent to which curtailment can be carried, as we are concerned in ascertaining the exact meaning and extent of the right of self-defense when viewed in the abstract.

This right of self-defense, now often designated by writers and jurists as a natural right which has not been and cannot be superseded by society, passed through a slow process of development before it was finally established. There was a time, indeed, when homicide in self-defense was itself a capital offense. Originally, slaying in self-defense operated as a forfeiture of the property of the slayer, and, in order to

avoid the physical penalty of his act, he applied to the king for a pardon. The chancellor signed the pardon in the king's name, but in order to avoid this useless formality "the chancellor as the dispenser of equity soon surpassed the chancellor as the mere keeper of the great seal." Finally, subsequent to the enactment of the Statute 24 Henry VIII, c. 5, "partly as the result of a statute [the statute last mentioned] and partly by the liberality of the courts of common law," the equitable defense, so designated because of the authority exercised by the chancellor as the dispenser of equity, became a legal defense. The history of the law of self-defense to the middle of the eighteenth century was as follows:

"Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law": 16 Harvard Law Review, 567, 572.

See, also, 21 Cyc. 794; 3 Columbia Law Review, 526; 2 Pollock and Maitland on History of English Law, 479.

The law upon the subject of forfeiture remained in practice for a long time; and while the law finally fell "into desuetude in the course of the eighteenth century," yet it was not until 1828 that forfeitures were formally abolished in England by 9 Geo. IV, c. 31, Section 10, which provides that no punishment or forfeiture shall be incurred by any person who shall kill another in his own defense: 3 Stephen on History of the Criminal Law of England, 77; 2 Pollock and Maitland on History of English Law, 481. Thus it appears that slaying in self-defense, now designated by modern authorities as an inalienable right, was originally an offense, and on that account was followed by a forfeiture of the slayer's property; and, moreover, it was necessary for the slayer to apply for a pardon in order

to avoid an additional penalty, which without a pardon could be imposed upon his person. In an early period pardons were not issued "as of course," although at a later date they "became pardons of course"; and at a still later time, instead of a pardon being issued by the king or by the chancellor, the jury was empowered to acquit the slayer. The practice of forfeiture seems to have endured longer than the practice of issuing pardons. There is, therefore, in view of the history of the right of self-defense, substantial foundation for the statement in 16 Harvard Law Review, 567, that

"The right to kill in self-defense was slowly established and is a doctrine of modern rather than of medieval law."

Although expressions may be found in some of the earlier writings which go no further than to say that the assailed may slay to prevent immediate death, yet all will admit that the right of self-defense is not confined within such narrow limits. It is conceded by all that an ordinary assault with the fists or the danger of a mere battery alone without any danger or apparent danger of more serious harm will not justify the taking of human life: *State v. Gray*, 43 Or. 446, 454 (74 Pac. 927); 1 Bishop's New Criminal Law, 508; 21 Cyc. 801, 813. However, it is likewise conceded by all that a strong and powerful man with his fists alone is capable of visiting great physical injury upon a weak and frail man; and hence when the assault is attended with such demonstration and the present ability to execute it, whether the assailant is armed or not, as to indicate to the assailed, acting reasonably upon appearances, that he is in imminent danger of being beaten and disfigured, or maimed, or his life imperiled, he has a right to withstand the assault, even to the extent of taking the life of the assailant": *State v. Gray*,

43 Or. 446, 455 (74 Pac. 927); *State v. Benham*, 23 Iowa, 154 (92 Am. Dec. 417); 13 R. C. L. 820. Here, then, is at least one limitation upon a right which, after a slow process of development, was incorporated into the common law and was a part of it when we received and accepted that great body of law. Does the common law prescribe any other limitations? If it does, what are those limitations?

One may not lawfully kill in self-defense to prevent a simple assault or ordinary battery with the fists, but one may slay to avert a more serious harm. How much more serious must that harm be? When common-law writers speak of "great bodily harm," what do they mean? Are the words "great bodily harm" used to mean the same thing as "felony" or do they signify something less than or different from a felony? The books abound with a variety of expressions when speaking of the circumstances which will or will not justify slaying in self-defense; as, "death or great bodily harm" (21 Cyc. 791, 800, 802, 812, 813-817, 819; 13 R. C. L. 811, 813, 814, 820); "if the assault is not felonious" the slayer is not justified (21 Cyc. 791); "death, great bodily harm, or some felony" (21 Cyc. 800); "must be of a felonious nature; it must be of such a nature as to apparently indicate that if carried out it will result in death or great bodily harm" (21 Cyc. 801); killing is not justifiable "unless it is accompanied by acts indicating imminent danger of great bodily harm or felony * * or if it is some other act less than a felony" (21 Cyc. 802); "may kill to save life, or limb, or to prevent a great crime" (13 R. C. L. 814); "loss of life or of suffering serious bodily harm" (13 R. C. L. 816); "must be one of great injury to the person, that would maim or be permanent in its character, or which might produce death" (Wharton

on Homicide, 376); "the danger must involve peril to life or limb, though the injury feared need not necessarily be a forcible felony, or felonious assault." (Wharton on Homicide, 376, citing *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465); *Evans v. State*, 120 Ala. 269 (25 South. 175); *Ritchey v. People*, 23 Colo. 314 (47 Pac. 272, 384).

The holdings in *Rogers v. State* and *Ritchey v. People* were based upon statutes; and so, too, many of the modern precedents are likewise based upon statutes. In twenty-four of the states there has been legislation defining the right of self-defense. In some of the states, as, in Arizona, California, Idaho, Montana and Utah, there are statutes providing that a homicide is justifiable when resisting any attempt to murder any person "or to commit a felony, or to do some great bodily injury upon any person"; or, when committed in the lawful defense of such person or certain other named persons, "when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury": Rev. Stats. Ariz. (1913 Penal Code), § 180; Cal. Penal Code (Deering 1915), § 197; 2 Idaho Rev. Codes, § 6570; 2 Rev. Codes of Mont. (1907), § 8301; Comp. Laws of Utah (1917), § 8032. In Arkansas the legislature has said that homicide is justifiable when committed in necessary self-defense "against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony"; and, further, "in ordinary cases * * it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary": Digest of the Statutes of Arkansas, § 1911. The states of Colorado and Illinois have statutory provisions like that of Arkansas: 1 Mills Ann. Stats. (1912), §§ 1761

and 1763; 2 Ill. Stats. Ann. (1913), §§ 3763, 3764. In Florida a homicide is justifiable when committed in the lawful defense of such person or of certain named persons "when there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury": 2 Fla. Comp. Stats. (1914), § 3203. The states of Minnesota, New York and Washington have statutes like that of Florida: Gen. Stats. Minn. (1913), § 8623; Gilbert's Cr. Code (1919), § 1055; Remington & Ballinger's Ann. Code & Stats. of Washington (1909), § 2406. In Kansas the statute reads as follows:

Homicide shall be deemed justifiable when committed "in resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling-house in which such person shall be; or, second, when committed in the lawful defense of such person * * when there shall be a reasonable cause to apprehend a design to commit a felony, or to do some great personal injury * * ": Gen. Stats. Kan. (1915), § 3370.

Mississippi, Missouri, New Mexico, North Dakota, Oklahoma, South Dakota and Wisconsin have statutes like the legislation in Kansas: 1 Hemingway's Ann. Miss. Code, § 960; 2 Rev. Stats. Mo. (1909), § 4451; New Mexico Stats. (1915), § 1471; 2 Comp. Laws N. D. (1913), § 9503; 1 Rev. Laws Okl. (1910), § 2334; Comp. Laws S. D. (1913), § 268; Wis. Stats. (1917), § 4366. In Vermont a killing is guiltless when a person kills another "in the just and necessary defense of his own life" or the life of certain designated persons, or kills "another who is attempting to commit murder, rape, burglary or robbery, with force or violence": Pub. Stats. Vt. (1906), § 5698. The legislation in Georgia will be referred to hereinafter. Thus it is seen that in each of the states of Arkansas, Colorado and Illinois

there is a statute which affirmatively declares that slaying is justifiable to prevent "great bodily harm"; and, therefore, in view of this affirmative legislation the holdings in *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465), and *Ritchey v. People*, 23 Colo. 314 (47 Pac. 272, 384), lose much of their force when attempted to be applied in jurisdictions like Oregon, when there is no analogous legislation. It will also be observed that in all the remaining states to which attention has been directed, except the state of Vermont, the language of the statutes is in the alternative, for the words are: "Felony, or * * some great bodily injury"; and, hence, precedents based upon statutes in any of those jurisdictions necessarily proceed upon the theory that "great bodily harm" is not always the equivalent of "felony," and consequently cases like *State v. Sloan*, 22 Mont. 293 (56 Pac. 364), cannot aid us when dealing with our statute, which is wholly different from the Montana enactment. *Territory v. Baker*, 4 N. M. (Johns.) 117 (13 Pac. 30, 40), is sometimes referred to as authority for saying that "great bodily harm" must amount to a felony before life may be taken in self-defense. When that case was decided there was a statute declaring that homicide was justifiable when committed in the lawful defense of such person "when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury * * "; and in view of that language it is difficult to agree with the conclusion that "great bodily harm" must amount to a "felony." The holding in *State v. Sloan*, 22 Mont. 293 (56 Pac. 364), is sounder, more logical and more consistent with the plain words of positive legislation.

We may now give our attention to precedents which were unaffected by and were decided upon rules of the

common law. In *Pond v. People*, 8 Mich. 150, Mr. Justice CAMPBELL, one of America's really great judges, said:

"The danger to be resisted must be to life, or of serious bodily harm of a permanent character."

And, again:

"The rule extends only to cases of felony; and in those it is lawful to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger."

In *United States v. Wiltberger*, 3 Wash. C. C. 515 (Fed. Cas. No. 16,738), Mr. Justice WASHINGTON said:

"The law is, that man may oppose force to force, in defense of his person, * * against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery, or the like. * * The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. * * The intent to commit a felony must be apparent; which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances."

In *State v. Benham*, 23 Iowa, 154 (92 Am. Dec. 416), we find the following:

"There can be no successful setting up of self-defense, unless the necessity for taking life is actual, present, urgent,—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from dreadful harm, or severe calamity, felonious in its character."

In *State v. Kennedy*, 20 Iowa, 569, the trial court told the jury among other things that: "Unless there

be a plain manifestation of a felonious intent, no assault will justify killing the assailant"; and Mr. Justice DILLON, speaking for the appellate court, said that the charge of the trial judge expressed the law "unless changed by statute." In *Acers v. United States*, 164 U. S. 388, 391 (41 L. Ed. 481, 17 Sup. Ct. Rep. 91, 92, see, also, Rose's U. S. Notes), the trial court charged the jury that: "Great injury to the person injured that would maim him, or that would be permanent in its character, or that might produce death"; and it was held that this "was a fair definition of what is necessary to constitute self-defense by reason of the existence of real danger." Among the multitude of reported decisions announcing the rule as stated in *Pond v. People* and kindred precedents, the following may be found: *State v. Thompson*, 9 Iowa, 188 (74 Am. Dec. 342); *State v. Burke*, 30 Iowa, 331; *Commonwealth v. Riley*, Thach. C. Cas. 471; *Shorter v. People*, 2 N. Y. 193 (51 Am. Dec. 286); *Brownell v. People*, 38 Mich. 732; *United States v. Outerbridge*, 5 Sawy. 620 (Fed. Cas. No. 15,978). Additional authorities may be found in the opinion of Mr. Justice BENNETT rendered in *State v. Butler*, (Or.), 186 Pac. 55. At this point, it is worth noting that the excerpt herein quoted from *State v. Benham* is quoted with approval in *State v. Hawkins*, 18 Or. 476, 487 (23 Pac. 475). *State v. Benham* is also cited in *State v. Gray*, 43 Or. 446, 456 (74 Pac. 927); and in *State v. Doherty*, 52 Or. 591, 596 (98 Pac. 152), this court relied upon *State v. Benham* and *Acers v. United States*, *supra*.

The rule of law justifying homicide to prevent felonies extends to violent and forcible acts which are by statute made felonies, even though such acts were not felonies at common law: *Pond v. People*, 8 Mich. 150, 181.

There are a few reported decisions found in jurisdictions, which have no legislation upon the subject, which either intimate or hold directly that the right of self-defense is dependent upon the essential quality and inherent character of the assault itself rather than upon the grade of punishment attached to it by the law. Among the former is: *Evans v. State*, 120 Ala. 269 (25 South. 175), and yet in addition to what was said in *Eiland v. State*, 52 Ala. 322, that court criticised a requested charge in *Blackburn v. State*, 86 Ala. 595, 599 (6 South. 96), because it did not assert that the "danger must involve peril to life or limb." A case belonging to the latter class and directly holding that the right of self-defense depends upon the character of the offense and not upon the penalty attached to it, is *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478 (23 Am. Dec. 431); but Mr. Bishop criticises that case by saying:

"These observations leave out of view the central truth that legal doctrine is shaped to promote certainty of judicial decision, as well as justice in the particular instances. And among the distinctions devised to bring together justice and certainty is the division of crime into felony and misdemeanor, with the different consequences which flow from each": 1 Bishop's New Criminal Law, 515.

In brief, the rule seems to be as firmly established as quantity and quality of precedents can establish any given doctrine that the right of self-defense, in the absence of a statute, is at common law limited to the prevention of felonies; and that an assault, actual or threatened, which does not really or apparently involve harm amounting to a felony is not "great bodily harm" within the meaning of the books. It is true that the classification of crimes under our Code turns upon the penalty attached to a given crime; but the

same thing has always been true of crimes at common law. In 2 Pollock and Maitland on History of English Law, 466, the authors define felonies and there remark:

“We thus define felony by its legal effect; any definition that would turn on the quality of the crime is unattainable.”

If we now turn to our Code and examine the chapter on “crimes against the person” it will be seen that every crime in the chapter is made a felony within the meaning of the law of self-defense, which deems an act a felony if it may be punished by imprisonment in the penitentiary, except Section 1924, L. O. L., defining assault and battery, Section 1925, L. O. L., which makes it an offense purposely to point a gun at another even though done without malice, and Section 1930, L. O. L., which defines libel; so that if Section 1909, L. O. L., is construed to mean what it plainly says, it is equivalent to saying, so far as practical results are concerned, that slaying in self-defense may if necessary be resorted to in order to prevent any “known” crime against the person except simple assault and battery. The act of pointing a gun at another may also, in certain circumstances, actually be or appear to be a felony. And, hence, for all practical purposes it may with propriety be said that Section 1909, L. O. L., includes every offense involving bodily harm, except the single misdemeanor of simple assault and battery.

The legislation in Georgia is exactly like the legislation in this state. There as here, crimes are divided into felonies and misdemeanors; and there as here, felonies include all offenses punishable by death or imprisonment in the penitentiary, while “every other crime is a misdemeanor”: 6 Park’s Ann. Code of Ga.

(1914), § 2. In Section 70 of the Georgia Code we read:

“There being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Justifiable homicide is the killing of a human being by commandment of the law in execution of public justice; by permission of the law in advancement of public justice; in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.”

This statute has been in force in Georgia since 1817: Prince's Digest of Laws of Ga. 347; and beginning with *Hudgins v. State*, 2 Kelly (2 Ga.), 173, 182, decided in 1847, down to the latest reported decision, the Supreme Court of that state has consistently upheld the statute and ruled that a killing to prevent an injury not amounting to more than a misdemeanor is not justifiable.

In *Powell v. State*, 101 Ga. 9, 23 (29 S. E. 309, 318, 65 Am. St. Rep, 277), it is said that Section 70 and another section of the Georgia Code “are parts of the common law.” In *Battle v. State*, 103 Ga. 53, 59 (29 S. E. 491, 493), the trial judge refused to charge the jury that:

“If the jury should believe from the evidence that the defendant hit the deceased the fatal blow in defense of his person, to prevent a serious personal injury, the defendant would be justified in killing the deceased; or that defendant killed deceased to prevent a felony being committed upon his property by deceased, then the killing would be justifiable; or if the killing was done to prevent the deceased from com-

mitting a trespass upon his property, the killing would not be murder, but would only be manslaughter."

On appeal the defendant complained because the requested charge was not given and the Supreme Court said:

"We cannot think that any proposition contained in this written request to charge should have been given in charge to the jury. So far as the first is concerned, it is not the law. The language of our Code justifies a homicide to prevent the commission of a felony upon the person of the slayer. An act of violence committed on the person of another, which is included within the class of offenses which the law declares to be felonious, will always include a serious personal injury; but an act of violence so committed, although it amounts to a 'serious personal injury' does not necessarily come within the class of crimes known as felonies. If, under our Code, the injury about to be inflicted was less than a felony, it would not be sufficient cause to justify the taking of life in self-defense. This justification is complete only (when the life of the assailant is taken) where the deceased, manifestly intended or endeavored by violence or surprise to commit a felony on the person of the accused."

In *Drew v. State*, 136 Ga. 658, 661 (71 S. E. 1108, 1110), Mr. Justice LUMPKIN ruled as follows:

"It may be said that the taking of human life by a private person is a grave matter, and is generally to be justified only as an actual or reasonably apparent necessary defensive or preventive measure against a trespass amounting to a felony."

The following are among the other Georgia precedents: *Keener v. State*, 18 Ga. 194 (63 Am. Dec. 269); *Aaron v. State*, 31 Ga. 167; *Simmons v. State*, 79 Ga. 696 (4 S. E. 894); *Cumming v. State*, 99 Ga. 664 (27 S. E. 177); *Crawford v. State*, 90 Ga. 701 (17 S. E. 628, 35 Am. St. Rep. 242); *Smarrs v. State*, 131 Ga. 21

(61 S. E. 914); *McCray v. State*, 134 Ga. 416 (68 S. E. 62, 20 Ann. Cas. 101); *Worley v. State*, 136 Ga. 231 (71 S. E. 153); *Johnson v. State*, 136 Ga. 804 (72 S. E. 233).

While it has been held that the refusal to give a requested instruction defining the meaning of the term "felony," it has also been decided that, in the absence of a request, failure to inform the jury of the meaning of the word will not necessarily work a reversal: *Holland v. State*, 3 Ga. App. 465 (60 S. E. 205); *Roberts v. State*, 114 Ga. 450 (40 S. E. 297); *Pickens v. State*, 132 Ga. 46 (63 S. E. 783); *Mills v. State*, 133 Ga. 155 (65 S. E. 368); *Scott v. State*, 137 Ga. 337 (73 S. E. 575); *Helms v. State*, 138 Ga. 826 (76 S. E. 353).

If we again give our attention to our own precedents we shall see that, although the words "great bodily harm" have become a part of our judicial vocabulary, nevertheless, it has never been expressly decided that Section 1909, L. O. L., does not mean what it says; but, upon the contrary, this court has more than once used the words "felony" and "felonious" when describing the character of the assault which will justify slaying in self-defense: *Goodall v. State*, 1 Or. 334, 338 (80 Am. Dec. 396). In *State v. Olds*, 19 Or. 397, 431 (24 Pac. 394, 417), we read:

"The right either of the state or of an individual to take human life must be sanctioned by law. In the latter case it must appear that it was done to prevent the commission of a felony upon the individual, etc., as provided in" Section 1909, L. O. L.

In *State v. Smith*, 43 Or. 109, 117 (71 Pac. 973, 976), it was said:

"Before one can excuse his conduct in taking the life of another, it must appear that it was done to prevent the apparent commission of a felony by the latter

upon him": citing *State v. Olds*, 19 Or. 397 (24 Pac. 394).

In *State v. Doherty*, 52 Or. 591, 596 (98 Pac. 152, 154), we find the following:

"Fear of a slight injury is not sufficient, nor will a mere assault, not felonious, furnish an excuse for the taking of life. * * But, considering the relative age and strength of the parties or the ferocity of the attack, if the intended beating is of such a character as to endanger life or limb, then it will be felonious, and the assaulted person is justified in taking the life of his assailant if necessary to preserve his own or protect him from such beating."

In *State v. Walsworth*, 54 Or. 371 (103 Pac. 516), Charles H. Walsworth and Norval Walsworth were tried and convicted of the murder of James F. Mankin. They defended upon the ground of self-defense; and they also asserted the right of Norval Walsworth to protect his mother from danger. Referring to the charge given to the jury this court, speaking through Mr. Justice McBRIDE, used the following language:

"The charge of the court admirably stated the issue to the jury, and the general charge upon the law of self-defense, so far as it related to the right of Norval and Charles H. Walsworth to defend themselves, is a *model* charge; but the court entirely omitted to charge the jury upon the right of defendant, Norval Walsworth, to protect his mother from danger to her life from an alleged unjustifiable attack upon the house by deceased and his brother."

An examination of the original record shows that this "model charge" upon the subject of self-defense contains the following language taken from *State v. Benham*, 23 Iowa, 154 (92 Am. Dec. 416), and repeated approvingly in *State v. Hawkins*, 18 Or. 476, 487 (23 Pac. 475, 479):

"The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense, unless the necessity of taking life is actual, present, urgent, unless in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from deadly harm or severe calamity felonious in its character."

The following are additional apropos decisions rendered by this court: *State v. Tarter*, 26 Or. 38, 45 (37 Pac. 53); *State v. Thompson*, 49 Or. 46, 49 (88 Pac. 583, 124 Am. St. Rep. 1015); *State v. Young*, 52 Or. 227, 232 (96 Pac. 1067, 132 Am. St. Rep. 689, 18 L. R. A. (N. S.) 688).

When our statute justifies homicide to prevent a felony, it is a confirmation rather than a departure from the common-law rule. Violence to the person which amounts to no more than the misdemeanor of simple assault and battery does not justify taking life; but a person is justified in slaying to avert imminent danger of violence amounting to a felony. Violence which rises to the degree of a felony is "great bodily harm"; violence which falls to the degree of a misdemeanor is not "great bodily harm." There was no error in informing the jury that "the danger must be that of a threatened felony."

I concur with Mr. Justice BURNETT's criticism of that part of the charge to the jury which speaks of indirect evidence; and I also concur in what he says on the subject of uncommunicated threats.

The judgment should be reversed and a new trial granted for the reasons hereinbefore stated.

McBRIDE, C. J., and BEAN, BENSON and BENNETT, JJ., concur.

Argued September 17, reversed October 7, rehearing denied December 30, 1919.

GARVIN v. WESTERN COOPERAGE CO.

(184 Pac. 555.)

Master and Servant—Complaint Sufficient Without Alleging Master's Rejection of Workmen's Compensation Act.

1. There being no presumption under the Workmen's Compensation Act as to whether the employer is subject thereto, the injured servant's complaint is not insufficient for failure to allege that defendant had elected not to come under the act, the matter being one of affirmative defense.

Aliens—Nonresident Alien's Action for Son's Death Properly Brought by Direction of Foreign Consul.

2. Under the treaties of the United States with Austria-Hungary, the Austrian consul-general has authority to direct an attorney to bring an action under the Employers' Liability Act on behalf of a mother who is a subject and resident of Austria for the death of her son.

Death—Nonresident Alien may Sue Employer for Death of Son.

3. A nonresident alien may maintain an action, under the Employers' Liability Act, for the death of her son against his employer.

Evidence—Sufficiency to Establish Relationship.

4. In an action by a nonresident alien for the death of her son, testimony of a relative and frequent visitor of the family that plaintiff treated decedent as her son and called him her son, and decedent treated plaintiff as his mother and had spoken of her as his mother, was competent to establish the relationship, being direct evidence thereof.

Evidence—Written Declaration of Alien Relative Prior to Action Admissible to Show Relationship.

5. In an action by the nonresident alien mother of deceased servant against the latter's employer, a letter written by deceased's brother in Austria to a relative in this state, made at a time when no controversy existed as to relationship of mother and son, was admissible evidence on the question of pedigree.

Evidence—Admission of Relationship by Defendant's Attorney in Another Action Inadmissible.

6. In an action by a nonresident alien mother for the death of her son against the latter's employer, a statement, made in argument in support of defendant's motion for nonsuit, in a cause in which this plaintiff was not a party, that it was disclosed by evidence that deceased had a mother so that his administrator could not bring action for his death, is not admissible as an admission by defendant of the relationship of mother and son.

Witnesses—Question Establishing Affirmative Defense not Proper Cross-examination.

7. In an action for the death of a servant by collision of a truck with an engine upon which the servant was riding, it was error for defendant to ask plaintiff's witness what kind and make the truck was, when witness had not testified as to the trucks, since such question was clearly directed toward establishing an affirmative defense and was not proper cross-examination.

Witnesses—Inconsistent Testimony in Former Proceeding Concerning the Same Accident Admissible.

8. In view of Section 861, L. O. L., it was proper, in an action against employer for the death of a servant, to ask a witness about his testimony at a coroner's inquest relative to same accident, for the purpose of impeachment, where there was an apparent inconsistency.

Master and Servant—Evidence of Use of Safety Appliances Admissible to Show Practicability.

9. In an action under the employers' liability law for death in a collision between an engine and a runaway logging-car, testimony that witness had worked for years in nearly every possible capacity in logging camps using trucks, and that on logging roads where there are grades, safety lines, safety rails, and derrails are used, was competent on the question of practicability of such safety devices.

Trial—Instruction Limiting Jury to One Item of Negligence Properly Refused.

10. In an action under the employers' liability law for a servant's death in a collision between an engine on which he was riding and a runaway logging-car, where there was evidence of negligence in not using snubbing lines and safety switches, an instruction limiting the jury to consideration of one item of negligence, based upon a defective drift-pin, which permitted the brake to loosen, was properly refused.

Death—Proper Measure of Damages for Son's Death.

11. In a mother's action under the Employers' Liability Act for the death of her son, an instruction that the jury might consider his age, life expectancy, health, ability, habits, mental and physical skill, and the amount which he would probably have saved from his earnings, held proper.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is an action wherein it is sought to recover damages for the death of one Mjo Rjacich, of whom the plaintiff claims to be the mother. The substantial facts as alleged in the complaint are that Mjo

Rjacich was a member of the section crew upon defendant's logging railroad; that at the time of the accident resulting in his death, he was riding upon one of defendant's engines; that at the same time other employees were loading a logging-car, and that after it was partially loaded, a bolt in the hand-brake attached to the car broke, thereby releasing the brake, whereupon the car "ran wild," colliding with the engine upon which Rjacich was riding, and thereby caused the injuries which resulted in his death. The alleged negligence upon which the right of recovery is based consisted in spotting the car upon a dangerous and steep grade without using the necessary methods of anchoring the car during the operation of loading it, as follows:

1. The defendant failed to provide "snubbing lines," consisting of a steel cable, one end of which is attached to the car and the other end to some stationary object, which would safely hold the car in place.

2. It neglected to safeguard the car with "safety chains," with which the car might be chained to the track.

3. It neglected to provide safety or derailling switches with which to derail a "runaway" car.

4. That the defendant, at the time of the accident, had a derailling switch installed below the grade where the car was being loaded, but it was spiked to the main line so as to be useless as safety device.

5. That it neglected to provide sound and substantial brakes on the logging-car, and failed to take measures to see that the brakes were in good working condition.

The answer, after denials, pleads affirmatively as follows:

That on or about the thirteenth day of September, 1915, defendant was and for some time prior thereto had been conducting a logging business in Clatsop County, Oregon. That in connection with said logging business defendant operated a logging railroad. That on or about the said thirteenth day of September, 1915, Mjo Rjacich was in its employ as a section-hand and at the time of his accident aforesaid he was riding on a locomotive belonging to defendant. That some distance away from the point of the accident a set of logging trucks were being loaded with logs at a logging rollway. That said trucks were practically new, and had been purchased from a reputable concern and had been manufactured by a reputable manufacturer. That the said trucks were of standard make, such as are used commonly in work of that kind, and had been properly inspected by the defendant. That each truck had a standard brake with a brake-staff which could be tightened from the side—that when tightened the said brake-staff was held in place by means of a pawl which fitted into a ratchet. That the said ratchet was attached to said brake-staff by means of a metal pin which ran through the said ratchet and said brake-staff. That while the said trucks were being loaded with logs the pin holding the ratchet attached to the forward brake-staff broke in some manner, thereby allowing the brakes to loosen from the wheels and the said trucks loaded with two logs started down the track, colliding with the trucks loaded with logs attached to the locomotive aforesaid, on which locomotive the said Mjo Rjacich was riding. That by reason of said collision the said Mjo Rjacich received injuries from which he afterward died. That the pin which broke appeared amply sufficient, and was put in place by the manufacturers. That an

inspection would not disclose any defect in said pin, and so far as this defendant knew, or could have known by the exercise of ordinary care, said pin was in good, first-class condition; and so far as defendant is concerned said accident was wholly unavoidable, accidental and unforeseen, and could not have been prevented by it through the exercise of ordinary care.

A reply having been filed, there was a trial, resulting in a verdict and judgment for plaintiff, and defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Messrs. Senn, Ekwall & Recken*, with an oral argument by *Mr. F. S. Senn*.

For respondent there was a brief over the names of *Mr. M. H. Clark* and *Messrs. Woerndle & Haas*, with oral arguments by *Mr. Charles T. Haas* and *Mr. Clark*.

Mr. A. P. Dodson appearing for Alien Property Custodian.

BENSON, J.—1. The first assignment of error is that the complaint is insufficient because it fails to allege that defendant had elected not to come under the Workmen's Compensation Act. The contention thus presented has been settled adversely to defendant's theory in *Olds v. Olds*, 88 Or. 209 (171 Pac. 1046).

2. It is then urged that the court erred in permitting plaintiff's attorney to testify that he was authorized and requested to commence the action in behalf of plaintiff at the request of and under the direction of the Austrian consul-general. The objection to this evidence was based upon the ground that under the statute no one but the mother is entitled to bring ac-

tion, and that the consul cannot authorize the proceeding. This question also has been set at rest in the recent case of *Ljubich v. Western Cooperage Co.*, 93 Or. 633 (184 Pac. 551), wherein it is held that under the treaties of the United States with Austria-Hungary, the consuls of that country are, in effect, *ex-officio* attorneys in fact, with ample authority in cases like the one at bar.

3. The next assignment is that the court erred in holding that the plaintiff can maintain this action, being a nonresident alien. Although this question has been frequently discussed and passed upon in many other states, this is the first time that it has been presented for our consideration. The leading case in the United States supporting defendant's theory of the law is that of *Deni v. Pennsylvania R. Co.*, 181 Pa. 525 (37 Atl. 558, 59 Am. St. Rep. 676), which has been followed by a few of the other states, notably Wisconsin and Indiana, but a great majority of the states have held to the contrary. A leading case in support of plaintiff's right to maintain the action is that of *Mulhall v. Fallon*, 176 Mass. 266 (57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934), wherein the court, speaking by Mr. Justice HOLMES, says:

"In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large

amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

In the comparatively recent case, *Anustasakas' v. International Contract Co.*, 51 Wash. 119 (98 Pac. 93, 130 Am. St. Rep. 1089, 21 L. R. A. (N. S.) 267), the Supreme Court of Washington, in an interesting opinion, wherein are cited a large number of the cases supporting either contention, speaking by Mr. Justice RUDKIN, says:

"The plea of alienage is not favored in law, and we are of opinion that the rule which permits nonresident aliens to maintain actions of this kind is supported by the weight of authority, and is more in harmony with the liberal cosmopolitan spirit of the age than the narrow provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens."

This case is also reported in 21 L. R. A. (N. S.) 267, where it is followed by an interesting note, citing practically all of the cases upon the subject.

At the conclusion of a brief and lucid discussion of the subject in 1 R. C. L. 825, is found this language:

"Since the statutes of the various states giving a right of action for negligent killing are copied from Lord Campbell's Act, the construction placed upon that act by a decision of the King's Bench in 1898 greatly influenced the courts which denied the right of action in the earlier cases; and, therefore, the disapproval of that decision in the later case before the same court but by different judges in 1901 would seem to weaken, to some extent at least, the weight of those earlier decisions of the state courts. It thus appears that the weight of authority both in England and the United States is that alienage is not a condition affecting a recovery for the death of a relative under the statutes allowing such an action."

We therefore adopt the doctrine that a nonresident alien is not precluded from maintaining the action.

4. Error is assigned upon the action of the court in refusing to strike from the record the testimony of the witness Mike Erstich. The substance of the testimony of this witness is to the effect that his father and decedent's father were first cousins; that decedent and himself were both born at Dinovo, Austria, a village containing about three hundred houses; that their homes were separated by the distance of about fifteen minutes' walk; that they had both lived at Dinovo all of their lives, until Mjo Rjacich had come to Portland about six years before his death, to which place the witness had followed about two and a half or three years later; that he had known the plaintiff from his earliest recollection; that he had been a frequent visitor at her home, which had also been the home of the decedent all of his life until he came to Portland; that in the home at Dinovo the plaintiff had treated the deceased as her son and called him her son; and that deceased had treated plaintiff as his mother and had spoken of her as his mother. The witness also testified that the decedent had sent money to his mother, and that after decedent came to Portland and before the witness left Dinovo, he saw the mother receive money which had been sent to her by decedent. It is urged that this evidence is incompetent for the reason that there is no other evidence in the record concerning the relationship of plaintiff and decedent, and that since this evidence consists of the declarations of the plaintiff, who is beyond the jurisdiction of the court, and of Mjo Rjacich who is dead, that it belongs to that class of hearsay evidence which is admissible only when there is evidence, *dehors* the declarations, of the relationship of the declarant to

the family. A careful analysis of this testimony shows that the witness himself is a relative; he says that he has known both declarants all of his life, that they bore the same family name, lived in the same house, conducted themselves toward each other as mother and son, and each addressed the other in a way to indicate such relationship. It will be at once observed that here is evidence, outside of the declarations of the plaintiff and Mjo Rjacich, tending to establish the relationship, being the direct evidence of the witness Erstich. In a very carefully considered case, *State v. McDonald*, 55 Or. 419 (103 Pac. 512, 104 Pac. 967, 106 Pac. 444), testimony of this nature is held to be competent, and it was not error to admit it.

5. Our attention is then directed to the fact that the court admitted in evidence a letter purporting to have been written by Matt Rjacich (a brother of Mjo Rjacich), mailed by him at a postoffice in Austria near Dinovo, and addressed to the witness Mike Erstich, who testified that it was a reply to one written by him, and that he recognized the handwriting as that of Matt Rjacich. The letter, as translated by the interpreter then in attendance upon the court, reads as follows:

“Dinovo, date March 1, 1916.

“My dear Matt:

“I am letting you know that we are in good health, thank God, wishing that this letter will also reach you in good health. My dear Matt, I’m in receipt of your letter and properly understand everything what you wrote me to send a power of attorney and I’m afraid it would not be all right if we did not put all names and dates of birth of our family. Mother was called to the Court yesterday and they want us give all names and date of birth and the Court will mail it to you. If you had written us right away you would have got

it long ago. Dear Matt, I ask you to do everything you can in this case. Dear Matt, answer right away. You will receive the power of attorney at any time. You can tell the Court that you wrote for the power of attorney and that it did not get there yet. Dear Matt, nothing else to write, receive my sympathy from me.

"Your dear cousin,

"MATT RJACICH.

"Good-bye, awaiting your answer."

This letter was written before the present action was begun, and before there was any controversy as to the identity of Mjo Rjacich's mother, and it was offered in evidence for the purpose of showing relationship. The defendant maintains that it is incompetent as being hearsay and a self-serving declaration, made after the death of Mjo Rjacich, and therefore inadmissible. The plaintiff insists that it constitutes the declaration of a member of the family (who is out of the jurisdiction and whose declaration is therefore competent evidence) upon the question of pedigree. We are not much impressed with the probative value of the contents of the letter and in fact find nothing of value in it, but so far as it tends to establish the question of relationship, we think it is clearly competent. In *Thompson v. Woolf*, 8 Or. 454, this court says:

"Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declaration can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations."

Here we have the evidence of Erstich that the author of the letter is a brother of the decedent, Mjo Rjacich, and that he is out of the state, living in

Dinovo, Austria. We know of no authority which makes any distinction between a written declaration and one that is spoken.

The fact that the letter was written after the death of Mjo Rjacich does not affect the admissibility of the declaration, unless it was made after the controversy had arisen, and upon this point the rule appears to be that the evidence is properly admitted if the declaration was made at a time when no controversy existed as to the precise question in regard to which the declaration is made: 2 Wigmore on Evidence, § 1483. In the present case, the letter from Matt Rjacich was written before this action was begun, and before any question of the identity of the mother had arisen. We therefore conclude that the letter was properly admitted.

6. The next assignment of error is based upon the action of the court in permitting J. F. Wood, the official court reporter to testify from his report of the evidence in a former case, the statement of W. E. Thomas, one of the defendant's attorneys, in a motion for a nonsuit as follows:

"The defendant at this time moves for a nonsuit. This is made upon the ground that this action has not been brot by a person who is entitled to bring the action under the laws of this state, in a case of this kind. This action, the fact is, as disclosed by the evidence in this case, and as alleged in the pleadings, brings this case within the employers' liability law, clearly and unquestionably. That being the case, an administrator of an estate cannot bring an action against a defendant under the conditions existing in this case. It is disclosed by the evidence that the deceased has a mother. Under the Employers' Liability Act of 1911, Section 4, this action cannot be brot by an administrator. The question was thereupon argued at length and at the conclusion of said argument

the court sustained the motion of defendant for a nonsuit, to which action of the court, in sustaining said motion, plaintiff then and there by counsel duly excepted."

The introduction of this portion of the record of a former action, in which the administrator sought to recover upon the same cause of action, was objected to by the defendant as irrelevant, incompetent and immaterial, and tending to prove no issue in the case. The plaintiff argues that the statement above quoted contains a formal admission that the decedent had a mother living and that, being inconsistent with defendant's attitude in the present action, the statement of its attorney is binding upon the client in this proceeding. In support of her contention, plaintiff calls our attention to certain cases which we briefly consider. The first is *Heywood v. Doernbecker*, 48 Or. 359 (86 Pac. 357, 87 Pac. 530). From the opinion in this case, counsel quotes the following:

"The admission of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation."

The effect of the language quoted is distinctly modified, however, by the next sentence which reads thus:

"This rule is not invoked to charge the plaintiff with an acknowledgment of a fact prejudicial to its interests, but as tending to show the theory of its counsel as to the basis of the second cause of action."

The next citation is *Missouri & K. Telephone Co. v. Vandevort*, 67 Kan. 269 (72 Pac. 771). This was a case in which the court admitted in evidence an admission of an attorney made in an opening statement to the jury in a former trial of the same case. In holding that it was properly admitted, the court says:

"In the statement was the admission of a material fact as to the action of the telephone company in the premises. From a reading of the record the admission appears to have been distinctly and formally made. In *Kindley v. Railroad Co.*, 47 Kan. 432 (28 Pac. 201), it was held that the court is warranted in acting on the admission of a party made in the opening statement of a case to the court and jury, and might make a final disposition of the case where such statement absolutely precluded a recovery by him."

The holding in this case appears to be opposed to the great weight of authority. In 1 Ency. of Evidence, 469, we find the rule stated thus:

"The admission to be binding must be so made as to be a part of the evidence in the case, or formally made to avoid or excuse the making of proof. Therefore, the mere admission or statement of counsel in an opening statement is not such as to amount to a binding admission.

"But there may be exceptions to this rule. Indeed, it has been held that an admission made by counsel, in the opening statement, may be conclusive of the case, and warrant a judgment without further proceeding." Citing a large number of authorities.

1 Greenleaf on Evidence, Section 186, states the rule thus:

"The admissions of attorneys of record bind their clients, in all matters relating to the progress and trial of the case; but to this end, they must be distinct and formal, or such as are termed solemn admissions; made for the express purpose of alleviating the stringency of some rule or practice, or of dispensing with the formal proof of some fact at the trial."

The next case to which our attention is called is *Oscanyan v. Arms Co.*, 103 U. S. 261 (26 L. Ed. 539, see, also, Rose's U. S. Notes), which was a case

wherein the attorney for plaintiff made an opening statement which disclosed that he was seeking to recover upon a contract which was corrupt, immoral and contrary to public policy. The defendant thereupon moved for a directed verdict, and the court asked the attorneys for the plaintiff if they claimed or admitted that the statements which had been made were true, and counsel replied in the affirmative, whereupon the motion was granted. This appears to be a clear case of an exception to the general rule, and properly so.

Our consideration is also invoked for a statement of the rule found in 16 Cyc. 965, as follows:

“Relevant judicial statements made or adopted by a party, although made without the knowledge or consent of his attorney, are when received by the court, admissible, not only in the case in which they are made, but in any subsequent trial or proceedings connected with it and in other cases in which the facts covered thereby are relevant. * * Judicial admissions are frequently those of counsel or attorneys of record. When these are made in good faith, in the counsel’s professional capacity, for the purpose of dispensing with evidence, and to that end are distinct and formal, they bind the client, whether made before, on, or after the trial.”

In attempting to relate these authorities to the case at bar, counsel has apparently overlooked certain important considerations. The statement of Mr. Thomas was made in argument in support of his motion for a nonsuit, in another action, in which the present plaintiff was not a party. In the case of *Brown v. Oregon Lumber Co.*, 24 Or. 315 (33 Pac. 557), Mr. Chief Justice LORD says:

“A motion for a nonsuit is in the nature of a demurrer to the evidence; it admits not only all that

the evidence proves, but all that it tends to prove. The evidence given for the plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it."

In effect, then, Mr. Thomas' statement amounts to saying:

"If we admit, and for the purpose of this motion we do, that every item of evidence offered by plaintiff is true, nevertheless, plaintiff, as administrator, cannot maintain this action, because he has offered evidence to prove that the decedent has a mother living, to whom the statute gives the exclusive right of action."

If an admission of this sort is binding upon the client in a subsequent action, properly brought, then every motion for a nonsuit becomes an admission against interest. We have been unable to find authorities which would justify such a conclusion. The admission of the statement was error.

7. It is then argued that the court erred in sustaining plaintiff's objection to the following question asked of the witness Robinson, upon cross-examination: "Do you know what kind, what make of truck this was?" This witness, who was superintendent of logging operations for the defendant company, had been called as a witness for the plaintiff and had been examined as to the various precautions in regard to safety of employees, but had not been examined with reference to the trucks. Plaintiff objected to the question upon the ground that it was not proper cross-examination, but was a part of defendant's direct case. It will be noted that the answer alleges that the truck was of a standard make, practically new, etc. The question was clearly directed to establishing an affirmative defense, and was not proper cross-examination.

It may also be observed that upon the defense, witnesses were permitted without objection, to describe the truck in detail. There was no error in the ruling of the court.

8. The same witness, who had at a prior time testified at the coroner's inquest, relative to the same accident, gave some testimony which appeared to be inconsistent with his testimony at such inquest, whereupon, over the objection of defendant, counsel for plaintiff was permitted to question him as to his former statements, and, he having denied making such statements, they were read into the record, and this is assigned as error. This assignment is fully answered by Section 861, L. O. L., and the case of *State v. Steeves*, 29 Or. 85 (43 Pac. 947).

9. The witness Lew McCutcheon testified that he had worked in logging camps for fifteen or sixteen years and has worked in nearly every possible capacity, and that his work had been altogether in camps using trucks. He then testified, from his observation and experience in regard to the use of snubbing lines, safety chains, safety and derailing switches, and other safety appliances, and was then asked this question: "Would you or would you not say now that on logging roads where there are grades, safety lines are used, and safety rails and derails and the means you have described as means of safety?"

The answer of the witness was "Yes, sir." To this question and answer the defendant objected upon the ground "that it is incompetent, irrelevant and immaterial, and no proper foundation laid, and does not prove any issue in the case, and calls for a conclusion." It is argued that this was error, and in support of such contention our consideration is directed to the case of *Trickey v. Clark*, 50 Or. 526 (93 Pac.

457). In that case the defendants called expert millmen who testified that the lever in use at the time of the accident was provided with a reasonably safe and proper lock and fastener. This court very properly held that such evidence was incompetent, since it was directed to the principal issue in the case, i. e., Was it negligence upon the part of the defendants to use the device which they did use? The jury had before them a model of the device, and its workings were fully explained to them, so that they were as competent as any expert to determine its utility. The testimony of McCutcheon, in the present case, stands upon a very different footing. The case upon which appellant relies was one founded upon the common law, that an employer must provide for his servant a reasonably safe place to work and reasonably safe appliances. The vital point for the jury to determine was, whether or not the device used was reasonably safe, and no witness could be permitted to answer that question for them. The present action, is based upon the employers' liability law, which requires the employer:

"To use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

It must be noted that the testimony of the witness was directed to the practicability of certain safety devices, and the fact that, in other places, he had seen them in use. In *Love v. Chambers Lumber Co.*, 64 Or. 129 (129 Pac. 492), we find this language:

"The complaint alleges that it was practicable for defendant to have so guarded the machinery as to

have prevented the accident without interfering with its ordinary use. This was denied in the answer, so it became necessary for plaintiff to establish the proposition that it could be so guarded. No better evidence could have been introduced for this purpose than to show that after the accident the machinery had been so guarded, and that such safeguards had not in any way impeded or interfered with its operation."

In *Camenzind v. Freeland Furniture Co.*, 89 Or. 158 (174 Pac. 139), this court held that it was proper to admit evidence of a safety appliance then in use in Switzerland, although nothing like it was known in the United States. We are therefore of the opinion that the evidence was properly admitted.

10. Defendant further assigns as error the refusal of the court to give certain requested instructions, the first of which reads thus:

"Defendant company further states that the cause of the runaway was the breaking of a drift-pin which passed through the ratchet and brake-staff; that there was a defect in this pin which the defendant company did not know or could not have known was present, and that such defect was a latent or hidden defect and that the defendant could not have known of this defect by the exercise of that degree of care which the law requires."

This requested instruction is of value only when read in connection with the next one, and counsel for defendant very properly presents them in his argument, together. The other one reads thus:

"The defendant company was not an insurer of the safety of its car and appliances; it was required to use every degree of care and caution which it was practicable to use in carrying on its work, and if you find that his casualty resulted because of the breaking of the drift-pin through the ratchet and brake-

staff and that this pin was crystallized or had in it a hidden defect which this company did not know or could not have known by the exercise of that degree of care which the law requires, then I instruct you that the plaintiff cannot recover in this action, and your verdict must be for the defendant."

The theory of defendant appears to be, that since an employer is not liable for hidden defects in the appliances furnished, that if he had used every care and precaution practicable in the inspection of the devices actually in use, he is absolved from all liability for injuries resulting from such latent defects. It may be that the authorities under the common law, and prior to the enactment of the Employers' Liability Act would have justified such a contention, but that statute has very greatly enlarged the legal obligations and liabilities of the employer. It declares that the employer—

"shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, without regard to the additional cost of suitable material or safety appliance or devices."

Section 4 of the act provides for the recovery of damages for any loss of life resulting from any violation of the requirements of the law. The complaint charges negligence in not using snubbing lines, safety switches, derailing devices, etc., and there was evidence supporting such allegations. The jury, therefore, could not be limited to a consideration of the one item of negligence based upon the defective drift-pin, and the instruction was properly refused.

11. The last assignment of error is that the court refused to give the instruction requested by defendant

upon the subject of the measure of damages. The portion thereof which is contended for reads thus:

"Your verdict must be based on the pecuniary loss which the plaintiff has suffered, and in arriving at this amount, you may take into consideration the money support which the deceased, in your judgment, would have contributed to the mother during the mother's lifetime. You may consider the age of the mother, if you know her age, and ascertain the probable length of her life; you may consider whether he would have contributed to the mother in the future, and for what length of time."

Instead of this, the court gave the following instruction:

"In ascertaining such damages you may take into consideration the age of the deceased, his expectancy of life as disclosed by the evidence, his health, ability, habits of industry, mental and physical skill; if you find that any such qualities are established by the evidence, his capacity for earning money by rendering service to others, or accumulating money or property, if any, the amount which deceased would probably have saved from his earnings or by his skill or bodily labor, if any, during the expectancy of his life. That is the measure of damages."

It is conceded that this instruction, as given, is in harmony with the rule as enunciated by this court in *McClagherty v. Rogue River Electric Co.*, 73 Or. 135 (140 Pac. 64, 144 Pac. 569). But it is urged that the rule thus declared is inconsistent with the doctrine of *McFarland v. Oregon Electric Co.*, 70 Or. 27 (138 Pac. 458, Ann. Cas. 1916B, 527), and that the latter is the more logical conclusion. We have examined both cases with care, and fail to find the inconsistency which appellant seeks to point out. In the case of *McFarland v. Oregon Electric Railway Co.* the court simply held that in an action under the Employers'

Liability Act, the plaintiff is not entitled to recover for the loss of the society of the deceased, for that was the specific question which was submitted. But if it were otherwise, the later case of *McClagherty v. Rogue River Elec. Co.*, has met the approval of this court in *Yovovich v. Falls City Lumber Co.*, 76 Or. 585 (149 Pac. 941), and impresses us as most satisfactorily declaring the measure of damage in this class of cases.

For the error in admitting in evidence the statement of Mr. Thomas in arguing a motion for nonsuit in a former action, the judgment must be reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, BURNETT and HARRIS, JJ., concur.

Submitted on brief October 8, affirmed December 2, rehearing denied December 30, 1919.

MILLER LUM. CO. v. DAVIS.

(185 Pac. 462, 464.)

Appeal and Error—Harmless Error in Remarks of Court as to Extent of Proof Required.

1. In an action to recover for goods sold, the trial court's statement, in apprising attorneys of his views of the law, and to explain a ruling, that "proof would not be required to be very extensive," if erroneous as invading the jury's province, held harmless to defendant.

Appeal and Error—Acceptance of Verdict as Conclusive Finding.

2. Where the instructions, if not more favorable to defendant than he could rightfully have demanded, at least were as favorable to him as he could reasonably ask, and there was substantial evidence supporting plaintiff's contention, verdict for plaintiff must be accepted as a conclusive finding that there was an express contract between the parties as alleged in the complaint.

Trial—Memoranda of Seller not Open to Exclusion on Blanket Objection.

3. In an action to recover for building materials sold and delivered under an express contract, plaintiff's memoranda, consisting of delivery slips executed in triplicate, one copy of which was kept as a permanent record, *held* not rendered inadmissible by defendant's omnibus objection that they were incompetent, irrelevant, and immaterial under the allegations, and because the complaint designated a specific contract for a specific sum, while the memoranda disclosed a different sum.

Appeal and Error—Correction of Mistake in Judgment as to Interest.

4. Where by inadvertence judgment was made to recite March 1st, instead of November 1st, of a given year as the date from which interest began to run, such mistake in the judgment entry can be corrected in the Supreme Court; defendant judgment debtor admitting that the facts warrant the allowance of interest from November 1st.

Costs—Modification of Judgment on Appeal.

5. Where by inadvertence the judgment entry recited March 1st, instead of November 1st, of a given year as the date from which interest began to run, modification of the judgment entry to correct it does not entitle defendant judgment debtor as a matter of right to his costs and disbursements on appeal.

ON PETITION FOR REHEARING.**Appeal and Error—Assignments of Error—Failure to Submit Argument in Brief—Effect.**

6. Where appellant fails to present any argument in brief submitted on some of the alleged assignments of error, they will be deemed to have been abandoned or waived. (Citing *Donohoe v. Portland Ry. Co.*, 56 Or. 58, 61 (107 Pac. 964).)

From Deschutes: T. E. J. DUFFY, Judge.

In Banc.

This is an action to recover money. Plaintiff, a corporation, alleges in its complaint that between September 1, 1916, and November 1, 1916, it sold to the defendant goods, wares and merchandise "consisting principally of lumber and building materials at the agreed and stipulated value of \$145.04," and that this sum is due to the plaintiff, together with interest at the rate of 6 per cent per annum from November 1, 1916. The answer admits the corporate character of the plaintiff and denies the remaining

allegations of the complaint. The jury found for the plaintiff in the sum of \$145.04, "together with interest thereon at the rate of 6 per cent from November 1, 1916." When the judgment was entered on the verdict on April 19, 1918, it recited that the plaintiff recover the sum of \$145.04 together with interest at 6 per cent per annum from "March 1, 1916." A motion for a new trial was disallowed and the defendant appealed.

AFFIRMED.

For appellant there was a brief submitted by *Mr. W. P. Myers*.

For respondent there was a brief submitted over the name of *Mr. E. O. Stadter*.

HARRIS, J.—1. The defendant contends that the court invaded the province of the jury by stating that "proof would not be required to be very extensive." This language was used by the court in the course of the examination of the first witness for the plaintiff and after the witness had been asked but six questions. The witness, who was the president of the plaintiff corporation, testified that the company sold the building materials to the defendant in September or October, 1916; and he was then asked to "state what the circumstance of that sale was and how it came about." The attorney for the defendant objected to the question "unless it is confined to the contract which is alleged in the complaint, the contract for the stipulated and agreed value of \$145.04"; and the attorney for the defendant further objected to any testimony "relative to the reasonable value or anything except an agreed and stipulated value as alleged in the complaint." The trial judge overruled

the objection; but before doing so he explained to the attorneys, not to the jury, his views concerning the legal question raised by the objection. The court said to the attorneys:

“The plaintiff will have a right to show a contract, and of course he will be bound by his allegations in the complaint. He can show a contract and show that there is now due and owing \$145.04. That would make his case. It would amount almost to a stated account and proof would not be required to be very extensive. I say the proof in this case, if confined to Mr. Myers’ suggestion, would amount to a stated account. I take it under the objection you will be entitled to show a contract and to show the amounts due. If that is the nature of the objection, I will overrule the objection.”

Thus it is seen that the language, of which the defendant now complains, was used by the trial judge for the purpose of apprising the attorneys of his views of the law and in order to explain the reasons for his ruling. The defendant does not complain of any instruction given or refused by the court. The charge to the jury was a careful and concise, and yet complete, statement of the law governing the jurors in their deliberations. Even though it be assumed that it were better that the words complained of had been unsaid, still, after reading the entire record, we are convinced that they were utterly without effect upon the jury; and we are entirely satisfied that the jury faithfully followed the instructions of the court.

2. The plaintiff alleges that the goods, wares and merchandise were sold at an agreed price. The defendant insists that there is no evidence to sustain the pleading and that the testimony showed, if it evidenced anything, an open and running account, standing “over a period of several months” with

debits and credits and a balance due. A. J. Miller, the president of the plaintiff corporation, was asked to "state what the agreed value was of the material which you sold him"; and he answered thus: "It was \$145.04." There was additional evidence in support of the complaint; and there was contradictory testimony. The court defined the meaning of the words "express contract" and explained to the jury that "the contract plaintiff is relying upon in this case is an express contract." The court also told the jury that:

"The burden of proof is upon the plaintiff to prove by a preponderance of the evidence that" it sold materials to the defendant and "that there was an agreement between plaintiff and this defendant" and that "defendant was to pay the plaintiff the sum of \$145.04 for such goods, wares and merchandise, or; you must find a verdict for the defendant and against the plaintiff."

Again, the court said to the jury:

"The plaintiff cannot recover unless it proves by a preponderance of the evidence that it entered into the particular contract alleged in the complaint and that it had such contract with this particular defendant, George Davis, and at the stipulated and agreed price of \$145.04."

The substance of the last quoted instruction was twice repeated to the jury. The jurors were even told that—

"Unless you find that the contract was actually for the sum of \$145.04 and no other sum, your verdict must be for the defendant."

The instructions given by the court, if not more favorable to the defendant in some particulars than he could rightfully demand, were at least as favor-

able to him as he could reasonably ask; and hence since there was substantial evidence supporting the contention of the plaintiff, the verdict of the jury must be accepted as a conclusive finding that there was a contract as alleged in the complaint.

3. With each load of material, the plaintiff's yardman made out a memorandum in triplicate showing, among other things, the kind and quantity of material delivered. One copy was "left by the teamster as a rule with the job"; and according to the testimony of A. J. Miller the "two other copies came into our office; one goes in as our permanent record and the other one we price up and mail out as a rule." The plaintiff offered and the court received in evidence nine of these delivery slips, being "the ones that are permanent records in the office." The defendant objected to the introduction of these memorandums on the ground that they were "incompetent, irrelevant and immaterial under the allegations of the complaint," and because "the complaint designates a specific contract for a specific sum" and the memorandums offered in evidence "disclose a different sum." The circuit judge explained his ruling by saying that the slips "are admitted in connection with what plaintiff alleges to be the contract, tending to show, if it does show, that there was a contract between these parties and that is all it is admitted for."

Besides showing the date of delivery and the kind and quantity of material delivered most of the slips were signed by some person "on the job" who by his signature acknowledged receipt of the load delivered. The original slips do not appear in the record which is presented to us, but typewritten copies of the originals were made and are found in the transcript. One of these typewritten copies indicates that the

original was signed by the defendant and the inference is that the defendant himself personally received the load of material represented by that delivery slip; and in this connection we may add that the plaintiff contends in its brief that the delivery slip just referred to shows that the defendant personally received the material. One of the slips purports to be signed by the defendant by an agent. Some of the memorandums purport to be signed by Dick Davis, the alleged contractor, by his agent; and one slip purports to be signed by Dick Davis. In the course of the argument about the admissibility of the memorandums the defendant expressly admitted that the "materials were delivered and went into his building"; and hence if it be assumed that the slips were what they purport to be and that the person signing them had authority so to do, it is plain that while some and possibly all the memorandums may have been subject to objections not presented at the trial, they were nevertheless not rendered inadmissible by the *omnibus* objection specified by the defendant.

4, 5. The defendant contends that the judgment ought to be reversed because it recites the allowance of interest from March 1, 1916, instead of November 1, 1916. This contention of the defendant in effect admits that, if the plaintiff is entitled to recover at all, the facts warrant the allowance of interest from November 1, 1916; and we shall therefore assume that the plaintiff is entitled to interest from the latter date. It is quite manifest that by reason of a pure inadvertence the judgment entry was made to recite "March 1, 1916," instead of November 1, 1916, as the date from which interest began to run. We understand from the record that the attention of the circuit judge was not called to the mistake and that the

objection was made for the first time after the appeal had been perfected. The mistake made in the judgment entry can be corrected here; and this modification does not entitle the defendant, as a matter of right, to his costs and disbursements on appeal. We think that in all the circumstances and on the authority of *Stabler v. Melvin*, 89 Or. 228, 232 (173 Pac. 896), and *Olson v. Heisen*, 90 Or. 176, 181 (175 Pac. 859), the plaintiff should have its costs and disbursements in both courts. With this slight modification the judgment is affirmed.

AFFIRMED.

Rehearing denied December 30, 1919.

PETITION FOR REHEARING,

(185 Pac. 464.)

On petition for rehearing.

DENIED.

Mr. W. P. Myers, for the petition.

Mr. E. O. Stadter, contra.

HARRIS, J.—The defendant contends that the original opinion did not pass upon all the assignments of error, and for that reason he asks for a rehearing.

6. When the original opinion was written the points discussed in the briefs were carefully compared with the exceptions enumerated in the bill of exceptions and with the assignments of error specified in the printed abstract. When writing the original opinion it was our purpose to discuss all the alleged errors referred to in defendant's briefs; and we thought that we had discussed all the points noted by the defendant in his briefs. We have again compared the bill of exceptions

and assignments of error with the briefs and find that we were not mistaken in our belief; for what we said in the original opinion necessarily passes upon every assignment of error which the defendant discussed in his opening and reply briefs. No point argued by the defendant in his briefs remains undecided. Some of the assignments of error are not mentioned at all in the briefs submitted by the defendant. Assignments of error, upon which no argument is presented in the brief of an appellant, are deemed to have been abandoned and waived: *Donohoe v. Portland Ry. Co.*, 56 Or. 58, 61 (107 Pac. 964). The petition for a rehearing is denied.

AFFIRMED. REHEARING DENIED.

Argued October 28, affirmed December 30, 1919.

ALMADA v. VANDECAR.

(185 Pac. 907.)

Appeal and Error—Insufficiency of Complaint to State Cause of Action may be Raised on Appeal.

1. The objection that a complaint does not state a cause of action is never waived, and may be raised for the first time upon appeal, even though a demurrer has been overruled in the trial court with the consent of the parties.

Replevin—Not Maintainable Unless Plaintiff Entitled to Possession.

2. Replevin is essentially a possessory action, and, unless plaintiff has the right of immediate possession, he cannot prevail.

Judgment—Pleading—Pleading must Support the Judgment.

3. In replevin the pleading must support the judgment and contain allegations of fact rather than conclusions of law.

Judgment—Sufficiency of Complaint to Support Judgment.

4. A defective statement of a good cause of action will support a judgment, but a pleading entirely omitting an essential fact or facts will not support a judgment.

Pleading—Complaint Stating Conclusion of Law Insufficient.

5. A replevin complaint, alleging that defendant unlawfully withholds and detains the property in question from plaintiff, states only a conclusion of law.

Pleading—Conclusion of Law.

6. A mere conclusion of law is not issuable, requires no denial, and does not aid a pleading.

Replevin—Complaint Failing to Show Right to Possession Insufficient.

7. A replevin complaint, alleging that plaintiff was the owner of a steer when it was taken from him by defendant, but not alleging that plaintiff was entitled to the possession at the time the action was commenced, which was some two years later, held insufficient to support a judgment for plaintiff.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This is an action in replevin. There was a verdict and judgment for the plaintiff. The defendant moved for a judgment notwithstanding the verdict; and, based upon that motion, the court set aside the verdict and judgment for the plaintiff and granted a new trial with permission to the plaintiff to amend his complaint. The plaintiff appealed.

The only questions presented upon this appeal arise out of the complaint filed by the plaintiff and, for that reason, the pleading is here transcribed in full:

"That on or about the 1st of April, 1916, at Baker County, Oregon, the plaintiff was the owner of one four year old steer branded _____, and of the value of \$125.

"That the defendant on the 1st of April, 1916, in Baker County, Oregon, without the plaintiff's consent and wrongfully, took said steer from the possession of the plaintiff.

"That before the commencement of this action, to wit: on the 27th day of November, 1918, the plaintiff demanded of the defendant possession of said steer.

"That said defendant still unlawfully withholds and detains said steer, at said defendant's ranch, about four miles from the town of Durkee, Baker County, Oregon, from the possession of plaintiff to his damage in the sum of \$50."

The defendant demurred to the complaint upon the ground that it "does not state facts sufficient to constitute a cause of action"; but afterwards the attorneys for both parties "now consenting and agreeing," the court entered an order overruling the demurrer and allowing defendant until January 30, 1919, within which to file his answer.

Within the time fixed by the order, the defendant filed an answer denying all the allegations of the complaint and alleging new matter as a separate defense. The affirmative allegations were to the effect that long prior to the commencement of the action the defendant purchased the ranch mentioned in the complaint together with about 500 head of stock cattle; that the steer claimed by the plaintiff "was one of the band of stock cattle purchased by defendant"; and that the defendant has been the owner and in possession of the steer since the alleged purchase. The evidence showed that one Vaughn was the person from whom the ranch and cattle were purchased.

The reply denied all the affirmative allegations appearing in the answer. A trial resulted in a verdict for the plaintiff. The defendant moved for a judgment notwithstanding the verdict, alleging in the motion that—

"The complaint in said action failed to show and allege the ultimate fact that the plaintiff in said action was the owner or entitled to possession of the personal property involved in said action at the time of the commencement thereof. * * "

After hearing the motion, the court set aside the verdict and judgment, granted a new trial and allowed the plaintiff thirty days within which time to serve and file an amended complaint.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Morton D. Clifford*.

For respondent there was a brief with oral arguments by *Mr. C. H. McColloch* and *Mr. James H. Nichols*.

HARRIS, J.—1. The objection that the complaint does not state sufficient facts to constitute a cause of action is never waived and may be raised for the first time in the appellate court, or it may be urged here even though a demurrer has been filed in the trial court and overruled with the consent of the parties: *Hargett v. Beardsley*, 33 Or. 301 (54 Pac. 203).

2-4. Replevin is essentially a possessory action. The primary right which the moving party seeks to enforce in this action is the right of immediate possession; and unless he is entitled to such possession he has no right to enforce. In this as in other actions there must be a pleading to support a judgment; and the pleading must contain allegations of fact rather than conclusions of law. A defective statement of a good cause of action will support a judgment; but a pleading which entirely omits an essential fact or facts does not support a judgment.

5-7. Turning to the complaint involved in this appeal we observe that the plaintiff says that he owned the steer on April 1, 1916, and that the defendant at that time took the animal from the plaintiff's possession without his consent. The action was not begun until November 30, 1918, more than two years after the alleged taking; and there is no allegation that the plaintiff was entitled to the possession of the steer at the time of the commencement of the action, unless it can be said that the last paragraph of the complaint

amounts to an averment of the right of immediate possession.

Following the ruling in *Scofield v. Whitlegge*, 49 N. Y. 259, this court, in *Kimball v. Redfield*, 33 Or. 292 297 (54 Pac. 216), held that language like the last paragraph in the complaint presented by this appeal is only a conclusion of law unmixed with the statement of any fact. A mere conclusion of law is not issuable, requires no denial, and does not aid a pleading: *Klov-dahl v. Springfield*, 81 Or. 168, 171 (158 Pac. 668); *Dickenson v. Henderson*, 90 Or. 408, 411 (176 Pac. 797); 31 Cyc. 50; 21 R. C. L. 441.

Treating the last paragraph in the complaint as a pure conclusion of law, and, on that account, eliminating it from the pleading, there is left a complaint which entirely fails to allege that the plaintiff was, at the time of the commencement of the action, entitled to the possession of the animal; and, therefore, the pleading is insufficient to support a judgment.

The ruling in *Kimball v. Redfield* was approved in *Simonds v. Wrightman*, 36 Or. 120, 127 (58 Pac. 1100), and it was applied and followed in *Eilers Piano House v. Pick*, 58 Or. 54, 57 (113 Pac. 54). Complaints exactly like the one presented here have been held insufficient in other jurisdictions: *Fredericks v. Tracy*, 98 Cal. 658 (33 Pac. 750); *Truman v. Young*, 121 Cal. 490 (53 Pac. 1073); *Chan v. Slater*, 33 Mont. 155 (82 Pac. 657); *Chambers v. Emery*, 36 Utah, 380 (103 Pac. 1081, Ann. Cas. 1912A, 332).

If the question were *res integra* in this jurisdiction this court as now constituted might be inclined to hold that the complaint is sufficient after a verdict and judgment; but the prior adjudications, to which attention has been directed, have established the rule of pleading in this state, and, unless overruled, are controlling

now. Regardless of what our views might be if the question were a new one, nevertheless we do not think that we are justified in overruling *Kimball v. Redfield* and thus changing the rule of pleading which has been firmly established. The holding in *Kimball v. Redfield* decides the question presented upon this appeal; and, hence, the order made by the trial judge must be affirmed. The cause is remanded for a new trial with permission granted to the plaintiff to amend his complaint.

AFFIRMED.

Argued November 20, modified December 30, 1919.

PENNOCK v. SHARP.

(185 Pac. 911.)

Appeal and Error—Findings Supported by Evidence not Reviewed.

1. Under Article VII, Section 3, of the Constitution, providing that no fact found by a jury shall be otherwise re-examined unless the verdict is unsupported by evidence, etc., a jury's findings cannot be disturbed upon appeal on the theory that they are against the weight of the evidence.

Appeal and Error—Technical Error in Including Interest not Mentioned in Complaint Corrected.

2. The allowance of interest where the complaint did not ask for it constitutes a technical error which will be corrected by modifying the judgment so as to eliminate the interest item.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action at law brought by plaintiff for the recovery from H. W. Sharp of the sum of \$1,500 for money alleged to have been received for the use and benefit of plaintiff.

The complaint alleged:

That defendant induced plaintiff to enter into a contract to purchase a one-fourth interest in his mercan-

tile business by means of certain alleged false representations, which, briefly stated, are as follows:

"1. Defendant represented that his business consisted of a stock of merchandise of the value of \$35,000.

"2. That the business was a very profitable one.

"3. That within a few years defendant had been able to build up the business from nothing to one having a stock of merchandise of the value of \$35,000.

"4. That defendant had enjoyed and received a large profit and income from said business.

"5. That defendant had purchased his home from the profits of said business, which he had valued in excess of \$5,000.

"6. That defendant represented that if plaintiff would invest the sum of \$5,000 in the business, defendant would place a valuation on said stock at a greatly reduced sum, to wit: the sum of \$20,000.

"7. That defendant represented the business to be free from debt, with the exception of \$2,000 due the bank.

"8. That defendant represented himself to be the owner of all the stock of merchandise with the exception of a small percentage which he held on consignment."

That on October 4, 1917, plaintiff discovered the falsity of the representations and found that in fact defendant had misrepresented and owned none of the merchandise carried in stock, but that same was held on consignment; that all he owned was office furniture and fixtures of the value of \$500; that defendant did not own his home and had not purchased the same from the profits of the business, but same was owned by defendant's wife, and further found that the business was indebted for a much larger sum than \$2,000, to wit: \$6,000.

That on or about the eighth day of October, plaintiff notified defendant of the false representations and

notified him that he would not proceed further with the payments for said business and alleges that defendant acquiesced in and agreed to the rescission of the contract and thereby charges defendant with the sum of \$1,500 as money had and received for the use and benefit of the plaintiff and the usual allegation follows that defendant promised to repay this money to plaintiff.

Defendant answered, denying the allegations of the complaint, except that the answer admitted the payment to him of \$1,500, alleging that under the contract plaintiff bought a one-fourth interest in his business and had paid this \$1,500 thereon, and counterclaimed for \$3,500.

The cause being at issue and a jury being waived, a trial was had before the court. At the conclusion of plaintiff's testimony defendant moved for a nonsuit on the ground of failure of proof, which was denied. Defendant then put in his testimony and thereupon the court found substantially that each allegation of fraud in the complaint was true, that an agreement of rescission was made, as claimed by plaintiff, and that defendant had promised and agreed to repay the \$1,500, as alleged in the complaint, and gave judgment for the sum of \$1,500, with interest at 6 per cent from and after December 14, 1917, from which judgment defendant appeals. MODIFIED.

For appellant there was a brief over the names of *Mr. B. A. Green* and *Mr. J. C. Veatch*, with an oral argument by *Mr. Green*.

For respondent there was a brief over the name of *Messrs. Flegel, Reynolds & Flegel*, with an oral argument by *Mr. John W. Reynolds*.

McBRIDE, C. J.—Both the pleadings and the briefs have traveled very far afield in this controversy.

Reduced to its ultimate terms the complaint alleges the payment to defendant of \$1,500 on a contract for the purchase of a one-fourth interest in defendant's business at \$5,000, a mutual agreement to rescind the contract and a promise by defendant to repay the \$1,500 received by him. The alleged fraudulent representations are merely matters of inducement, explaining why the plaintiff demanded a rescission and could have been omitted without impairing the sufficiency of the complaint.

In this case we are bound by the findings of the court below if there is any evidence to sustain them, and have no authority to inquire into the comparative weight of the testimony. Plaintiff and his wife testified with great positiveness as to the representations made by defendant and there can be no doubt but that if he did make them they were untrue, and that he could not have been ignorant of their falsity.

1, 2. Plaintiff also testified positively as to the agreement with defendant that the contract should be rescinded and that defendant should return to plaintiff the purchase money already paid him. It is true that all this is strongly denied by defendant in his testimony, but under Section 3 of Article VII of our Constitution, the court sitting as a jury was the exclusive judge of the facts and we have no authority to disturb its findings, and indeed upon consideration of the whole testimony we have no disposition to do so. The complaint did not pray for interest and the allowance thereof constitutes a technical error, which, however, does not affect the substantial merits of the controversy.

The judgment will be modified here so as to eliminate the item of interest and otherwise affirmed. Neither party will recover costs in this court. **MODIFIED.**

BURNETT, HARRIS and BENNETT, JJ., concur.

Argued November 21, affirmed December 30, 1919.

STATE v. BATEHAM.*

(186 Pac. 5.)

Criminal Law—Failure to Try Accused at First Term of Court.

1. A defendant who was not brought to trial at the next term after filing of the indictment, unless the postponement was upon his application or by his consent, is entitled to have the indictment dismissed as of course, unless good cause is shown by the state, under Section 1701, L. O. L.

Criminal Law—Accumulation of Cases "Good Cause" for Postponement of Prosecution.

2. Accumulation of undetermined cases may be sufficient to prevent the discharge of an accused under Section 1701, L. O. L., where he is not brought to trial at the next term of court after the filing of the indictment, such an accumulation, where it prevents the case of an accused being reached for trial, being "good cause" for postponement within the meaning of such statute.

Criminal Law—Discretion of Court as to Postponement.

3. Whether the state has shown "good cause" for having failed to try an accused at the next term of court following filing of an indictment as required by Section 1701, L. O. L., rests largely in the discretion of the trial court.

Witnesses—Competency of Children.

4. Whether proffered witnesses under 10 years of age are incapable of receiving just impressions of facts respecting which they are examined within the meaning of Section 732, L. O. L., is a question for the decision of the trial judge who sees them, hears them and has opportunity to test their understanding and intelligence to his satisfaction.

[As to competency of an infant as witness, see note in 14 Ann. Cas. 3.]

Criminal Law—Review of Decision Concerning Capability of Child Witness.

5. A decision of the trial court as to whether or not proffered witnesses under 10 years of age are incapable of receiving just im-

*For authorities passing on the question of competency of children as witnesses generally, see note in 19 L. E. A. 607.

On age of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony, see note in L. E. A. 1915E, 1222.

On evidence of good character to raise the question of reasonable doubt, see note in 20 L. E. A. 609.

pressions of the facts respecting which they are examined under Section 732, L. O. L., is a decision of a preliminary question of fact which cannot be disturbed on appeal, if there is any evidence in the record to support it.

Criminal Law—Evidence to Show Other Crimes Inadmissible.

6. It is prejudicial error to admit evidence tending to show accused guilty of any crime other than that charged in the indictment.

Witnesses—Criminal Law—Cross-examination of Character Witnesses.

7. In a prosecution for taking liberties with a female child, defendant having put witness on the stand to testify to his reputation as a moral, law-abiding man, prosecution was properly permitted, on cross-examination of the witnesses, to ask if the witnesses had ever heard of the defendant's taking improper liberties similar to that described in the indictment with the person of another female child, naming such child, and the matter of cross-examination, where an accused tenders his supposed good character in evidence, rests largely within the discretion of the trial judge but is subject to review in case of abuse of discretion.

Criminal Law—Witnesses—Cross-examination of Character Witnesses.

8. Although a defendant who tenders his supposed good character in evidence thereby invites scrutiny and disclosure of specific generic instances of his misconduct that may incidentally impute to him guilt of other crimes, it would be reversible error for the state to ask questions on cross-examination of character witnesses solely for the purpose of intimating to the jury that the defendant was guilty on other charges of like nature, which the state's attorney could not prove directly and which had no foundation within his knowledge or information.

Criminal Law—Child not an "Accomplice."

9. To be an "accomplice" one must be of sufficient intelligence and understanding knowingly to enter into and help carry out a plan for the commission of the crime, and must actually participate, and a little girl who is a victim rather than a participant is not an accomplice of one prosecuted for sodomy.

Criminal Law—Reasonable Doubt—Character Evidence may be Considered.

10. The jury must consider all the testimony, that about character as well as all other, and if, taken all together, there remains a reasonable doubt of the defendant's guilt, he is entitled to acquittal.

Criminal Law—Instructions as to Reasonable Doubt.

11. If a jury bases reasonable doubt on testimony about good character of the accused, the resulting acquittal is legitimate; but the court has no right to instruct the jury that such testimony is sufficient for that purpose, as such an instruction would be an invasion of the province of the jury, in view of Section 139, L. O. L.

Criminal Law—Credibility of Evidence is for Jury.

12. In a criminal prosecution, the weight of the evidence and the credibility of the witnesses are questions solely for the jury, and the appellate court will not be moved by defendant's contention against the probability of the truth of the testimony against him.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

On July 30, 1918, the defendant was indicted in Multnomah County for an offense defined and made punishable by Section 2099, L. O. L., as amended by Chapter 21, Laws of 1913. He was tried December 20th of that year and from the resulting judgment of conviction he has appealed.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Wilson T. Hume* and *Mr. O. A. Neal*.

For the State there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, *Mr. J. L. Hammersley*, Deputy District Attorney, and *Mr. E. F. Bernard*, with an oral argument by *Mr. Bernard*.

BURNETT, J.—The first contention of defendant is that he was entitled to have the indictment dismissed because he had not been brought to trial at the next term after accusation had been filed. He relies upon Section 1701, L. O. L., reading thus:

“If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown.”

The terms of Circuit Court in Multnomah County begin on the first Monday of each month and end on the last secular day of that month except that the June term extends to the first Monday in September. The defendant was arraigned and pleaded not guilty during August after the filing of the indictment. Later on, his trial was appointed for December 3, 1918. At

that time he moved to have the indictment dismissed for the reason above noted, and supported it by his affidavit to the effect that the delay of trial was not of his asking and that the September, October and November terms had passed without his having been brought to trial. He also made a showing based on official reports to the effect that during the year 1918, prior to that time, the Circuit Court had tried only seventy criminal cases. The state opposed the motion by affidavits disclosing in substance that the trial docket of the Circuit Court was so crowded with cases at issue and for trial that it was impossible to reach the defendant's case earlier; that at the end of each term the court had made a general order continuing all unfinished business to the next following term for the want of time to dispose of it, and that owing to the prevalence of influenza and in deference to the requirements of the board of health no jury had been summoned for the November term.

1-3. The crucial question is whether the state has brought itself within the exception embodied in the last clause of Section 1701, L. O. L., "unless good cause to the contrary be shown." If no cause is shown by the state, the defendant is entitled to have the indictment dismissed as of course. This is the effect of *State v. Rosenberg*, 71 Or. 389 (142 Pac. 624), and its companion case, *State v. Hellala*, 71 Or. 391 (142 Pac. 624). Absence of any showing on behalf of the prosecution is the basic reason of the decision in *Ex parte Begerow*, 133 Cal. 349 (65 Pac. 828, 5 Am. St. Rep. 178, 56 L. R. A. 513), and *People v. Morino*, 85 Cal. 515 (24 Pac. 892). In *State v. Kuhn*, 154 Ind. 450 (57 N. E. 106), the state appealed from an order of the trial court dismissing the indictment on motion of the defendant. A trial had resulted in a disagreement of

the jury and three full terms of court had elapsed afterwards without the cause having been called for trial, all without fault of the defendant. There was no exception in the Indiana statute similar to the one under consideration in the Oregon Code, and on that ground the Supreme Court of that state held that the lapse of three terms gave the defendant the absolute right to be discharged. *Van Buren v. People*, 7 Colo. App. 136, (42 Pac. 599), follows the earlier case of *Cummins v. People*, 4 Colo. App. 71 (34 Pac. 734), and is based on a statute of that state which was construed to give the court no discretion to detain a defendant beyond three terms of court unless the delay was due to his action or consent. *In re Von Klein*, 67 Or. 298 (135 Pac. 870), and *Ex parte Clark*, 79 Or. 325 (154 Pac. 748, 155 Pac. 188), are cases in which the effort was to compel the Circuit Court by *mandamus* to dismiss the indictment because of the situation portrayed in Section 1701, L. O. L.; but the writ was denied in each instance on the ground that the remedy by appeal was adequate to redress the defendant's grievance in the denial of his motion. This disposes of all the precedents cited by the defendant on this branch of the case. On the contrary we have lately decided in substance in *State v. Bertschinger*, 93 Or. 404 (177 Pac. 63), that an accumulation of undetermined cases is sufficient to prevent the discharge of the defendant, and this doctrine is supported by paragraph XI of the extended note to *Ex parte Begerow* in 56 L. R. A. 513. We cannot draw a conclusion favorable to the defendant from the fact that only seventy criminal cases were tried in the Multnomah Circuit Court during the period mentioned in the affidavit on that subject. To aid the Fabian policy of the defense, the showing of the state ought to be combated by sworn statements disclosing that there

were times during the terms succeeding the return of the indictment when the court could have heard this case. The case made by the state of "good cause to the contrary" appeals largely to the discretion of the trial court and we are not prepared to say from the record before us that the discretion was abused in this instance.

4, 5. The prosecutrix named in the indictment was nine years old and another child used as a witness was seven, at the time of trial, and error is predicated by the defendant on the ruling of the court permitting them to testify for the prosecution. "Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are not competent witnesses: Section 732, L. O. L. Whether such proffered witnesses are incapable within the meaning of the statute is a question for the decision of the trial judge who sees them, hears them and has opportunity to test their understanding and intelligence to his satisfaction. In that matter and in the first instance he decides a preliminary question of fact and that his decision in that matter cannot be disturbed on appeal, if there is any evidence in the record to support it, is taught by the cases of *State v. Jackson*, 9 Or. 457, and *State v. Jensen*, 70 Or. 156 (140 Pac. 740), cited by the defendant. Moreover, a perusal of the record convinces us of the correctness of the decision of the trial judge on this point. The declarations of the witnesses in question evince an intelligence and clearness of statement amply sustaining the ruling permitting them to testify. Furthermore, the judge very properly cautioned the jury in substance that his decision was not to be taken as any intimation of the effect to be given

to the testimony of the little girls, so that the legal right of the defendant was not abused.

6-8. Several witnesses for the defendant testified on direct examination that his reputation as a moral, law-abiding man is good. On cross-examination, the prosecuting officer, over the defendant's objection, was permitted to ask each character witness in substance if he had ever heard that the defendant had taken with the person of a certain other little girl, named in the question, improper liberties similar to that described in the indictment. Both the act and name of the child were specified in the cross-interrogatory. In each instance the witness answered in the negative. The defendant contends that this was error, because thereby the state informed the jury by innuendo that the defendant was guilty of, or at least charged with, other like crimes, violating in principle the doctrine of such cases as *State v. Jensen*, 70 Or. 156 (140 Pac. 740). Those precedents teach that with certain exceptions, not here involved, it is prejudicial error to admit evidence tending to show the defendant guilty of any crime other than that charged in the indictment. If that were the question here at issue we would be compelled to award a new trial, for the precept is a just one and thoroughly grounded in the law. A distinction is to be drawn, however, between an attempt to offer direct testimony about other crimes, on one hand, and the limits of cross-examination, on the other, although something may thereby incidentally appear indicative of other criminality on the part of the defendant. Here the moral character of the accused was drawn directly in question. He himself invited inquiry about it by putting in testimony in general terms about his good character. Certainly the prosecution legitimately could ask the general cross-interrogatory if

the witness had ever heard of the defendant's doing acts of the same kind as that charged. That the cross-examiner may go further and specify the acts and the persons concerned, is established by *State v. Ogden*, 39 Or. 195 (65 Pac. 449), and *State v. Doris*, 51 Or. 136 (94 Pac. 44, 16 L. R. A. (N. S.) 660). The doctrine is that when a defendant, as he only can, tenders his supposed good character in evidence to influence the scale in his favor, he thereby invites scrutiny and disclosure of specific, generic instances of his misconduct to depreciate the weight of the testimony of his character witnesses, although the answers elicited may incidentally impute to him other guilt. Although it is a recognized element of cross-examination, it is subject to discretionary control of the trial judge, who will restrain its abuse. It is quite impossible definitely to fix the boundary between pettifoggery on one hand and proper cross-examination on the other, so as to govern all cases with exactness. It must be left to the discretion of the presiding judge, acting in the light of the circumstances of the case before him, subject to reversal if an abuse of discretion appears. The *Ogden* case especially is conclusive on the point immediately involved. No abuse of the court's prerogative appears. It is urged that the district attorney did not expect an affirmative answer to any such question, but there is nothing in the record by which we can determine that matter. If, in truth, he asked the questions solely for the purpose of intimating to the jury that the defendant was guilty on other charges of like nature, which he could not prove directly and which had no foundation within his knowledge or information, he was guilty of a most contemptible, unprofessional piece of pettifoggery. It would be beneath the dignity of any practicing lawyer, much more of a pub-

lic prosecutor, and should lead to a reversal. But that situation is not made to appear and the assignment of error on that point must be disregarded.

9. The testimony was to the effect that both the children were present at the time named in the indictment and that the act charged was committed by the defendant first upon one and then upon the other. His counsel argued that they were therefore both accomplices and that their testimony alone was not sufficient to sustain a conviction without corroboration. The court, however, charged the jury in effect that to be an accomplice one must be of sufficient intelligence and understanding knowingly to enter into and help carry out a plan for the commission of the crime, and not only so, but actually must have participated. In other words, to be accomplices the little girls must be participants rather than victims. The principle thus announced is sound and finds support by analogy in precedents to the effect that the female in a rape case who is below the age of consent cannot be an accomplice, however willing in fact she may have been to join in the criminal intercourse. The reason is that the law conclusively deems her to be incapable of the consent so necessary to stigmatize an accomplice.

10, 11. Last of all, the defendant insists that it was error for the court to refuse the following request to instruct the jury:

“You are further instructed that the defendant in this action has offered proof as to good character and reputation in the community, as to morality and as a law-abiding citizen. The weight of this testimony depends upon the character sought to be established as well as upon the character of the evidence offered, and you are the sole judges of the weight to be given to the evidence. (I charge you that evidence of good character and good reputation is sufficient to raise a rea-

sonable doubt and in some cases in which guilt would be otherwise established beyond a reasonable doubt evidence of good character may justly produce an acquittal.) And if you have a reasonable doubt upon all of the evidence in the case you must return a verdict of not guilty."

This request is vitiated by the portion included in parentheses. That part is a direct invasion of the prerogative of the jury in judging of the effect and value of the evidence. It is contradictory of the next preceding sentence. In one breath it is stated that the jurors "are the sole judges of the weight to be given to the evidence." In the next it would have the judge assume as a matter of law that evidence of good character and reputation is a sufficient basis for an acquitting, on the ground of reasonable doubt. We say, "assume as a matter of law," for we must remember that—

"In charging the jury the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case * * "; Section 139, L. O. L.

The true rule is that the jury must consider all the testimony, that about character as well as all other; and if taken all together there remains a reasonable doubt of the defendant's guilt he is entitled to acquittal. Very properly in some cases the jury might hold the testimony against the defendant in such low estimation and that about his good character so excellent that it would deem the latter a sufficient sanction for a reasonable doubt of his guilt; but the court must leave that to the jury itself. If it bases the reasonable doubt on the testimony about good character the resulting acquittal is legitimate, but the judge has no right to say to it that such testimony is sufficient for that purpose.

It would be only a step further to direct a verdict of not guilty in all cases where the undisputed testimony reveals a good character and reputation for the defendant.

12. We are not to be moved by the earnest argument of defendant's counsel against the probability of the truth of the testimony against him. That is an appeal that should have been and probably was made to the jury with which alone is lodged the power to decide the merits of the case on the facts.

We have carefully considered the questions of law presented and, finding no error, the judgment must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued November 20, reversed and remanded December 30, 1919.

MURPHY v. OREGON ENGRAVING CO.

(186 Pac. 12.)

Pleading—Legal Sufficiency of Defensive Matter to be Tested by Demurrer.

1. Sham, frivolous and irrelevant matter may be stricken out of a pleading; but its legal sufficiency as matter of defense must be tested by demurrer.

Novation—Defense Showing Novation in Action on an Assigned Debt not Frivolous, Sham or Irrelevant.

2. In an action to recover a debt on an account stated between plaintiff's assignor and his employer, a defense showing a novation between the assignor, the employer and a third party, whereby the employer should discharge assignor's debt by paying it to the third party for stock purchased by assignor from such party, held not frivolous, sham or irrelevant, for such novation, if performed, would constitute a good defense to the action.

Account Stated—Single Liquidated Demand not Basis for Account Stated.

3. It is not proper to rest a stated account upon a liquidated demand, already agreed upon and which either party is bound to pay,

as, for instance, a promissory note alone, although such an instrument might be included among numerous other items of debit and credit existing between the accounting parties.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

After stating the corporate character of the defendant, the complaint alleges:

"That on or about the ninth day of January, 1918, an account was stated by and between said Oregon Engraving Company aforesaid, acting by and through its duly authorized president, Roy E. Robinson, wherein and whereby it was determined and stated that there was due and owing one George E. Matthews the sum of \$440.75, this sum being due and owing said Matthews for labor and services performed while acting as manager of said Oregon Engraving Company aforesaid by said Matthews; that no part of said sum of \$440.75 has been paid, save and except the sum of \$50, leaving a balance due on said stated account of the sum of \$390.75.

"That prior to the beginning of this action and for value, said account aforesaid, with said balance due and owing of \$390.75, was duly sold, assigned and transferred to plaintiff herein and by reason of the premises plaintiff is now the legal owner and holder thereof and defendant is indebted to plaintiff in the sum of \$390.75, which said sum has been demanded from said plaintiff and same has not been paid, nor any part thereof."

A demand for judgment follows:

The answer denies all the quoted allegations of the complaint and further sets forth matter designed to show that when Matthews contracted to purchase some stock in the defendant corporation from Robinson a novation was entered into between them and the company, whereby the latter should discharge its liability to Matthews by paying his debt to Robinson

for the stock purchased; and it is further stated that all labor and services performed for the defendant by Matthews had been fully paid for by the defendant and Robinson. According to the abstract, all the matter relating to the novation and the statement connecting Robinson with the payment to Matthews were stricken out. The reply denied the remainder of the new matter in the answer.

The court made findings of fact substantially in the language of the complaint, except that they declared the account to have been stated between the defendant and Matthews. From the ensuing judgment the defendant appealed. **REVERSED AND REMANDED.**

For appellant there was a brief and an oral argument by *Mr. Bartlett Cole*.

For respondent there was a brief and an oral argument by *Mr. B. A. Green*.

BURNETT, J.—It will be noted that the complaint does not show that Matthews had anything to do with the stating of the account. Neither does it show that any previous relation giving rise to debits or credits existed between him and the defendant. Strictly speaking, it does not show that the labor and services mentioned were performed by him or for the defendant. It is not averred in the complaint by whom the balance of the account was transferred to the plaintiff. No effort was made, so far as disclosed by the record, to correct the complaint in these particulars.

1, 2. The important error, however, is found in the ruling of the court striking out the matter from the answer relating to the novation mentioned. In his

brief the plaintiff contends that the motion to strike those averments from the defendant's pleading was not allowed. On that point we are bound by the statement in the abstract, to which no objection seems to have been urged. Sham, frivolous and irrelevant matter may be stricken out of a pleading, but its legal sufficiency as matter of defense must be tested by a demurrer. The new matter in the answer is subject to the criticism that it does not sufficiently show that the transaction involved in the novation was the same that the complaint described, but the motion was not sufficient to raise that question. The matter is certainly not frivolous, sham or irrelevant. If, in fact, the defendant owed Matthews and he owed Robinson, it was legitimate subject of contract that the defendant should pay Robinson for Matthews, instead of paying the latter direct, and if performed this would constitute a good defense to this action.

3. In pleading an account stated, it is much safer to show that some previous relation existed between the parties to the accounting, giving rise to debits or credits. We cannot conceive of an accounting for liability upon a tort. Neither is it proper to rest a stated account upon a liquidated demand already agreed upon and which either party is bound to pay, as, for instance, a promissory note alone, although such an instrument might be included among numerous other items of debit and credit existing between the accounting parties.

Neither party seems to have stated its case in the pleadings with model accuracy. Better statements may be accomplished by amendments, but, principally for the reason that by striking out the new matter of the answer the defendant was deprived of the right to prove a discharge of its indebtedness to Matthews

by the new contract of novation, the judgment is reversed and the cause remanded to the Circuit Court for further proceedings. **REVERSED AND REMANDED.**

McBRIDE, C. J., and BENNETT and HARRIS, JJ., concur.

Submitted on briefs at Pendleton October 29, affirmed December 30, 1919.

J. L. PRICE BROKERAGE CO. v. BAKER GROCERY CO.

(186 Pac. 23.)

Sales—Burden of Proof on Purchaser in Action for Breach of Contract.

1. In an action by a purchaser for breach of a contract to deliver potatoes, the burden was on him to show, not only that he had complied with the conditions of the contract on his part, or that he was ready to comply at the time and place fixed by the contract, but also that defendant failed to deliver or have the potatoes ready for delivery on payment by plaintiff.

Sales—Purchaser's Duty to Accept Delivery and Make Payment.

2. Where potatoes have been sold to be delivered at a designated point, the purchaser must be on hand, either in person or by some authorized representative, to accept the potatoes and pay the price, and he cannot insist that the potatoes be billed or shipped to him from such point until payment is made; the seller having stipulated for payment through a bank at that point.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This is an action brought by the plaintiff, a Missouri corporation, against the defendant, a corporation doing business at Baker, Oregon, to recover damages for an alleged breach of contract to deliver three carloads of potatoes. It is alleged that the defendant agreed with the plaintiff to deliver to it three car-

loads of potatoes f. o. b. Baker, Oregon, at the price of \$1.25 per hundred, in the fall of the year 1916, and that defendant refused to deliver the same. Plaintiff also alleges that the price of potatoes, at the time when the same should have been delivered, was \$2.25 per hundred-weight, and that it lost the difference between the contract price and the actual market value, or \$1 per hundred-weight, and was thereby damaged in the sum of \$900.

The negotiations between the plaintiff and defendant were entirely by telegram and letter, and were as follows:

Telegram from plaintiff to defendant:

"St. Joseph, Mo. Oct. 9th, 1916.

"Baker Grocery Co.,

"Baker, Oregon.

"Wire best price few cars good sacked or bulk potatoes shipment any time this month.

"J. L. PRICE BROK. Co."

Telegram from defendant to plaintiff:

"Baker, Oregon, 11:20 A. M. Oct. 11-16.

"J. L. Price Brok. Co.,

"St. Joseph, Mo.

"Wire recd, can furnish car one dollar FOB Baker.

"BAKER GRO. Co."

Telegram from plaintiff to defendant:

"10-11-1916.

"Baker Grocery Co.,

"Baker, Oregon.

"Ship us one car draft bill of lading to Bank of Buchanan County here. Can you refer us to some good active honest man there that we could get to buy us few cars of potatoes on commission. Wire our expense. Can use several cars."

Telegram:

"Baker, Oregon, Oct. 11-1916.

"J. L. Price Brok. Co.,

"St. Joseph, Mo.

"Wire received. We buy more potatoes than any one else. If your price is right will be glad to ship you what we can. Writing you.

"BAKER GROC. CO."

Letter from defendant to plaintiff, viz:

"Baker, Oregon, Oct. 11, 1916.

"J. L. Price Brokerage Co.,

"St. Joseph, Mo.

"Gentlemen:

"We have your wire of the 11th, and wired you as follows: 'Wire received, we buy more potatoes than any one here. If your price is right, we shall be glad to ship what we can. Writing you.'

"We are in position to get you quite a few cars of potatoes if some one does not come in from the outside and boost the price out of reason. I heard today that they were buying in La Grande and paying from \$1.00 to \$1.10 per hundred. We will try and get hold of a few cars for you but in case the price is advanced here we will wire you. The crop seems to be short in certain territories and they are very anxious for potatoes which has caused some of the larger houses to send men into this territory to take care of their wants.

"We wish to confirm the order for one car to be shipped at \$1.00 per hundred. This car we expect to load out in about a week as they are now digging here and we have bought some very nice potatoes.

"I notice that you request that we make draft through the Bank of Buchanan County. We would much prefer that you would have your bank wire the First National Bank of Baker, Oregon, to pay draft when presented. We will be very glad indeed to have you look us up through any agency or write any of the banks of Baker or the Lumbermans Bank of Portland. Will state that we are a branch house of

Lang & Company of Portland, Oregon, wholesalers who have a number of branches over Oregon, Washington, and Idaho. I had a little experience about ten years ago in shipping potatoes east. While these were shipped bill of lading attached we never received a cent on them which makes us rather uneasy in regard to shipping to a firm that we never heard of before this time.

"We hope this will be satisfactory to you and thanking you for the order we are,

"Yours truly,

"BAKER GROCERY Co.

"S.

"JWS/RCL."

Telegram 10-12-16 (from plaintiff to defendant):

"Baker Grocer Co.,

"Baker, Oregon.

"Can use few more cars whenever you can ship.

"J. L. PRICE BROK. Co."

Telegram (from plaintiff to defendant):

"October 14, 1916.

"Baker Grocery Co.,

"Baker, Oregon.

"Letter eleventh received. We can use five cars good skd potatoes for shipment any time this month at one dollar ten per hundred FOB there. Will have the bank there pay you for each car as loaded. Wire acceptance at once.

"J. L. PRICE BROK. Co."

Telegram 10-16-1916 (from defendant to plaintiff):

"J. L. Price Brok. Co.,

"St. Joseph, Mo.

"Cannot buy at price offered in your wire.

"BAKER GROCERY Co."

Telegram 10-16-1916 (from plaintiff to defendant):

"Baker Grocery Co.,

"Baker, Oregon.

"Name price at which you can load five cars.

"J. L. PRICE BROK. Co."

Telegram Oct. 17, 1916 (from defendant to plaintiff):

"Baker, Oregon.

"J. L. Price Bkge Co.,

"St. Joe, Mo.

"Will load three cars at one twenty five per hundred.

"BAKER GROCERY Co."

Telegram 10-17-16 (from plaintiff to defendant):

"Baker Grocery Co.,

"Baker, Oregon.

"Wire received. We accept three cars dollar quarter. Route U. P. Care St. Joseph Grand Island. Send draft bill of lading to Bank of Buchanan County here.

"J. L. PRICE BROKERAGE Co."

Letter from defendant to plaintiff, viz:

"Baker, Oregon, 10-17-1916.

"J. L. Price Brokerage Co.,

"St. Joseph, Mo.

"Gentlemen:

"We have your wire of the 17th accepting our offer of three cars of potatoes at \$1.25 FOB Baker. We, also, had your wire a few days ago stating you would place funds in the bank here to pay for three cars. We have not yet heard from you in this respect. If you have not already done so, please wire the First National Bank, Baker, Oregon, to pay our draft when presented. We would like to have you give this immediate attention for if we take these potatoes into

the basement it would cost considerable to také them out again.

"Yours truly,

"BAKER GROCERY Co."

"S."

Telegram Oct. 19, 1916 (from defendant to plaintiff):

"Baker, Oregon.

"J. L. Price Brokerage Co.,

"St. Joe, Mo.

"Can you furnish cars. If not unable to ship spuds.

"BAKER GROCERY Co."

Telegram 10-19-1916 (from plaintiff to defendant):

"St. Joe, Mo.

"Baker Grocery Co.,

"Baker, Oregon.

"Ship soon as get cars. Keep after railroad. You confirmed three cars must furnish. We have them sold. Answer.

"J. L. PRICE BROKERAGE Co."

Telegram Oct. 24, 1916, 3 P. M. (from defendant to plaintiff):

"Baker, Oregon.

"J. L. Price Brok. Co.,

"St. Joe, Mo.

"Unless money placed in First National Bank, Baker to pay for potatoes contract is broken. Loaded to-day and no money here to pay for it. Answer by wire.

"BAKER GROCERY Co. 8:47 P. M.

Telegram 10-24-1916 (from plaintiff to defendant):

"St. Joe, Mo.

"Baker Grocery Co.,

"Baker, Oregon.

"Wire quick number pounds potatoes in car amount money. Will wire cash tomorrow. Answer quick. We have three more cars coming.

"J. L. PRICE BROK. Co."

Telegram Oct. 25, 1916 (from defendant to plaintiff):

"Baker, Oregon. 8:21 A. M.

"J. L. Price Bro. Co.,

"St. Joseph, Mo.

"Wire received. Railroad company positively refuses to hold car.

"BAKER GROCERY CO. 11:17 A. M.

Telegram Oct. 25-1916 (from plaintiff to defendant):

"St. Joe.

"Baker Grocery Co.,

"Baker, Oregon.

"You absolutely have to furnish those potatoes or will hold you for difference. How can we pay cash when dont know amount. Wire amount dollars quickly. Will wire cash.

"J. L. PRICE BROKERAGE CO."

That the foregoing telegrams and letters were sent and received as therein indicated on the dates and times given and stated therein, and were so sent and received in the ordinary course of business. It is stipulated that the foregoing were all the communications between plaintiff and defendant in relation to the matter.

The defendant denied that it failed to deliver the potatoes, as required by the contract, and alleges that it performed all the conditions of the contract upon its own part and had the potatoes ready for delivery.

There was a judgment of nonsuit against the plaintiff in the court below, from which it appeals to this court.

AFFIRMED.

For appellant there was a brief submitted by *Mr. O. B. Mount*.

For respondent there was a brief prepared and submitted by *Messrs. Clifford & Clifford*.

BENNETT, J.—The correspondence above was the only evidence offered on behalf of plaintiff, except some evidence in relation to the market value of the potatoes at the time of delivery, and some evidence as to the readiness and willingness of the plaintiff to take and pay for the potatoes. There was no evidence that the plaintiff had any representative at the place of delivery, to accept or pay for the same, or that it ever had any money in any bank in Baker, Oregon, or in Baker, Oregon, at all, to pay for the three carloads of potatoes.

Plaintiff claims that the defendant, after loading the potatoes, should have telegraphed it the weight of the carloads, and the amount of money necessary to make the payment, and that it was in default in its delivery, because it did not do so. The defendant, on the other hand, claims that the plaintiff should have had the money actually at the bank at Baker, Oregon, to take up the bill of lading, and that it did not do so; and that after defendant had waited as long as it could, under the railroad regulations, it was compelled to sell the potatoes to another customer at a loss.

It seems to have been the opinion of the court below that the minds of the parties never met as to where and how the payment for the potatoes was to be made, and that, therefore, there was no consummation of the contract. When the plaintiff was arranging for the shipment of the first car (which is not in controversy here) it had telegraphed:

“Ship us one car. Draft bill of lading to Bank of Buchanan County here.”

In response to this telegram the defendant wrote a letter containing the following paragraph:

"I notice that you request that we make draft through the Bank of Buchanan County. We would much prefer that you would have your bank wire the First National Bank of Baker, Oregon, to pay draft when presented. * * I had a little experience about ten years ago in shipping potatoes East. While these were shipped bill of lading attached we never received a cent on them, which makes us rather uneasy in regard to shipping to a firm that we never heard of before this time."

In answer to this the plaintiff, on the 14th, telegraphed:

"Will have the bank there pay you for each car as loaded."

After some telegrams of negotiation back and forth, the defendant finally on the 17th, telegraphed:

"Will load three cars at one twenty-five per hundred."

To this the plaintiff answered on the same day:

"We accept three cars dollar quarter. *Route U. P. care St. Joseph Grand Island. Send draft bill of lading to Bank of Buchanan County here.*"

Defendant did not answer this telegram by wire, and never acceded to the latter clause of the same, but on the contrary, on the same day, wrote the plaintiff at length, saying:

"We also had your wire a few days ago stating you would place funds in the bank here to pay for three cars. We have not yet heard from you in this respect. If you have not already done so, *please wire the First National Bank, Baker, Oregon, to pay our draft when presented.* We would like to have you give this immediate attention for if we take these potatoes into the basement it would cost considerable to take them out again."

Up to this time it is clear the minds of the parties had not met as to where payment was to be made or

how. The defendant had never accepted the condition attached to plaintiff's telegram of October 17th, asking that the draft accompany the bill of lading. On the contrary, the defendant was evidently depending upon the assurance of plaintiff's telegram of the 14th:

"Will have the bank there pay you for each car as loaded."

The plaintiff in due course of business must have received the letter of the defendant demanding that the money be placed in the bank to pay for the cars as soon as loaded, on the 20th or 21st of October. It paid no attention to the letter, and did not answer it in any way, and up to the 24th of October it had made no arrangement with the Baker Bank whatever, for payment. After some intervening telegrams in relation to the providing of cars, the defendant finally, on October 24th, telegraphed the plaintiff:

"Unless money placed in First National Bank, Baker, to pay for potatoes contract is broken. Loaded car today and no money here to pay for it. Answer by wire.

"BAKER GROCERY Co."

To this the plaintiff answered.

"Wire quick number pounds potatoes in car amount money. Will wire cash tomorrow. Answer quick. We have three more cars coming."

On the next day defendant answered:

"Wire received. Railroad company positively refuses to hold car."

There was no evidence whatever that plaintiff ever did send the money to Baker City, or arrange with the Baker City bank to make payment. Apparently they accepted defendant's last telegram as a refusal

to fulfill the contract, and they never have offered or tendered any money to pay for the potatoes, nor have they ever had the money at Baker ready to pay for them.

1. Of course the burden was upon the plaintiff to show, not only that it had complied with the conditions of the contract upon its part or that it was ready to comply, at the time and place fixed by the contract; but also that the defendant failed to deliver or to have the potatoes ready for delivery upon payment by plaintiff. Yet there was no evidence offered that the defendant had failed or refused to perform, or that it did not have the potatoes ready for delivery, in accordance with its contract.

For aught that appears in the evidence, all of the potatoes may have been at the cars ready for loading, or they may have been actually loaded in the cars. If it were not for the allegation in defendant's answer that they had at some time later been compelled to sell the potatoes to other parties, there would be nothing in the case to show that the potatoes were not yet upon the railroad tracks at Baker, awaiting acceptance by the plaintiff. The loading and delivery of the cars and the payment by the plaintiff were concurrent conditions. Each had to be ready and willing at the place where the delivery was to be made to perform the conditions of the contract upon its own part, before it could hold the other party for default. It would be no compliance with the contract upon the part of the defendant, if it had kept the potatoes on the farm where they were raised, perhaps 10 or 15 miles from Baker, however willing and ready it might be to deliver. Neither was it a compliance with its part of the contract, on the part of the plaintiff, to

have the money ready at some point back in Missouri to pay for the purchase.

2. It was the duty of the plaintiff to be on hand, at the point designated for delivery, either in person or by some authorized representative, to accept the potatoes and pay the price. It may be a question as to whether the plaintiff could insist upon the loading of the potatoes in cars, until it was there by a representative ready to pay the money, but certainly it could not insist that the potatoes be turned over to it, or billed or shipped to it, until the money was paid. It seems to be the contention of the plaintiff that the defendant was bound to wire to it the weight of the potatoes and the amount of money necessary, and then give it time, after the potatoes were loaded, to make arrangements with the bank at Baker to pay for the same.

That might have been a gentlemanly and courteous thing for the defendant to do, but we cannot see that it was under any such legal obligation. If the plaintiff had arranged for some representative to be present and to accept the potatoes and make payment for the same, there evidently would have been no trouble. It would not have been necessary for the plaintiff to send three times the money, or any sum of money, to the bank at Baker, as suggested by it. If it was a reputable concern, it would have been very easy for it to arrange, through its bank at home with the bank at Baker, to pay whatever sum should appear to be due upon presentation of the bill of lading. This was what the defendant asked plaintiff to do, but it seems to have gotten stubborn, and insisted upon financing the arrangement at long distance in its own way. In doing this, it got itself in a position where it was

unable to make a strict and literal performance of the conditions of the contract upon its own part.

It is doubtful whether the minds of the parties ever met as to the place and manner of payment, in such a way as to make a consummated contract; but assuming that they did, we think the plaintiff has not shown a sufficient performance of the contract upon its part or a breach of the contract upon the part of the defendant. In reaching this conclusion we do not find it necessary to pass upon the question as to whose duty it was to furnish the cars upon which the potatoes were to be loaded.

The judgment of the court below is affirmed.

AFFIRMED.

Motion to dismiss appeal submitted February 28, overruled April 8, argued on the merits November 12, 1919, affirmed January 6, 1920.

DOLPH v. SPECKART.

(179 Pac. 657; 186 Pac. 32).

Appeal and Error—Notice of Appeal—Description of Judgment—Date—Misleading Respondent.

1. Where a notice shows that defendant appeals from a judgment rendered June 28th, and the transcript discloses a judgment entered July 1st, the misdescription was not such as to mislead plaintiff, and defendant could assume that the judgment was rendered on the date of the verdict, as provided by Section 201, L. O. L., and plaintiff was not prejudiced thereby, where he appeared several times to object to the sufficiency of the sureties upon the undertaking.

Appeal and Error—Notice of Appeal—Description of Judgment—Inaccuracy in Amount—Further Appearances of Appellee.

2. Where a notice of appeal states that the judgment was for \$128, when it was for \$128.50, the inaccuracy could not have misled respondent, particularly where his appearances thereafter in the Circuit Court indicated that he was not uncertain as to the judgment appealed from.

Appeal and Error—Notice of Appeal—Negligence.

3. Although a notice of appeal describes the judgment as of an erroneous date, where the affidavit of appellant's counsel shows that the date given in the notice was the same as that in the copy of the

proposed judgment served upon him by respondent's counsel, he is thereby relieved from any imputation of carelessness in preparation of notice.

Appeal and Error—Appeal Statutes—Liberal Construction.

4. Substantial compliance with the appeal statutes is all that ought to be required to the end that no one shall be deprived of his right to be heard by reason of any mere technicality arising from strained construction.

ON THE MERITS.

Evidence—Value may be Proved by Showing Amount Realized at Sales.

5. When it becomes necessary to ascertain the value of articles for which there is no open market, evidence of price realized at sales of such articles, held under conditions calculated to secure adequate returns, is admissible, provided that the time of sale is not too remote to raise a logical inference.

Evidence—Inadmissible When in Conflict With Written Stipulation.

6. In an action by an attorney to recover compensation by reason of a breach of a percentage contract, defendant having employed other counsel, who brought action, and stipulations were entered into between the client and opponent, wherein it was agreed that the client was entitled to at least \$50,000, evidence that the client's opponent contended that the client was not entitled to the amount stipulated was properly excluded, being in direct conflict with the written stipulation.

Stipulations—Construction of Stipulation That Payment to Plaintiff Should be Without Prejudice to Rights.

7. A clause, "said payment to be without prejudice to the rights of any of the parties to this suit," in a stipulation in an action to recover part of the estate of a deceased person wherein it was agreed that plaintiff was entitled to at least \$50,000, which was given her, *held* to refer to litigation as to the balance of the fund, and not to the amount paid plaintiff.

Attorney and Client—Amount of Damages for Breach of Contract of Employment Question for Jury.

8. In an action by an attorney for breach of a contract of employment under which his compensation was to be a certain percentage of the amount recovered, defendant having employed other counsel, who brought an action, wherein it was stipulated that defendant was at least entitled to certain stock which was deposited in the registry of the court, whether defendant accepted such stock as her property so as to entitle plaintiff to compensation *held* for the jury, although the stock remained in the registry of the court.

Attorney and Client—Breach of Contract by Client—Amount of Compensation.

9. Where a client breached a contract under which he employed an attorney to obtain or recover part of the estate of a decedent claimed by the client, and employed other counsel, who brought an action wherein it was stipulated that the client was at least entitled

to certain corporate stock, which was then given to the client, damages for breach of the contract with the attorney should be based on the value of the corporate stock at the time it was issued or given to the client.

Contracts—Construction to Give Effect to Entire Contract.

10. Written contracts should be construed from the standpoint of the parties when they were contracting, and be so interpreted as to give effect to all the provisions, if possible.

Attorney and Client—Measure of Damages for Breach of Contract of Employment.

11. Where one employs an attorney and makes an express valid contract, stipulating for the compensation which the attorney is to receive for his services, such contract is, generally speaking, conclusive as to the amount of such compensation.

Attorney and Client—Right of Client to Terminate Relationship cannot Defeat Claim for Compensation.

12. While a client may terminate the relationship between himself and his attorney, where an attorney is prematurely discharged or is otherwise wrongfully prevented from performing the professional duties for which he was employed without fault on his part, he is entitled to compensation, even though the arrangement was for a contingent fee, provided the contingency has happened.

Attorney and Client—Measure of Damages for Breach of Contract of Employment.

13. A client, by wrongfully preventing the performance of acts which entitle an attorney to specific compensation under a contract, becomes liable in damages in such amount.

Trial—Construction of Stipulations and Orders in Other Suit Question for Court.

14. In an action by an attorney for damages for breach of a contract of employment under which he was to receive as compensation a certain percentage of the amount recovered, the client, having employed other counsel, who brought action in the federal court, wherein certain stipulations were entered into concerning the amount due the client, the construction of orders entered in the federal court and stipulations therein was for the court.

Appeal and Error—Findings Supported by Evidence not Disturbed.

15. Under the Constitution, where there is any competent evidence to support a verdict, the Supreme Court is precluded from disturbing the same.

From Multnomah: ROBERT TUCKER, Judge.

In Banc.

On motion to dismiss appeal.

OVERRULED.

Mr. Henry J. Bigger, for the motion.

Mr. E. E. Heckbert, *contra*.

McBRIDE, C. J.—This is a motion to dismiss an appeal, on the ground that the notice of appeal does not describe with sufficient certainty the judgment appealed from.

The notice of appeal is in the usual form and states that the defendant appeals from a judgment against her rendered on June 28, 1916, for the sum of \$128; the further sum of \$2,509.14, and the sum of — dollars costs. The transcript discloses a judgment for the sum of \$128.50, the further sum of \$2,509.14, and \$57.05 costs, entered on July 1, 1916, and dated June 29, 1916. The notice of appeal was served August 27, 1918, and an undertaking on appeal was served and filed September 6, 1918, which undertaking followed the notice in the description of the judgment. On September 10, 1918, the plaintiff filed exceptions to the undertaking, and on September 20th, the exceptions were heard and defendant was required to give a new undertaking, which undertaking was actually filed on September 20, 1918, which also followed the notice of appeal. This undertaking was excepted to, and thereupon on September 25, 1918, defendant filed an undertaking on appeal and for a *supersedeas*, which was conditioned to satisfy the judgment that should be rendered on appeal. The description of the judgment in this undertaking followed the previous undertaking and recited that the judgment was rendered on June 28, 1918. No exception being filed, the undertaking was approved.

1. We do not think the misdescription of the judgment was such as to have misled the plaintiff. The

verdict was rendered on June 28th, and the judgment should have been rendered on that day: Section 201, L. O. L.

The defendant, in taking her appeal, naturally assumed, and had a right to assume, that plaintiff had complied with the law, and should not be prejudiced by the fact that plaintiff had waited until a later date to enter the judgment, if in fact it was entered and in force at the date of taking the appeal. As before recited, the plaintiff appeared several times in the Circuit Court to object to the sufficiency of the sureties upon the undertaking, thereby recognizing the fact that he was informed of and knew the judgment defendant was attempting to appeal from, and, indeed, considering the fact that the judgment was upon two causes of action, and for separate amounts in each, and that the verdict was rendered upon the twenty-eighth day of June, and the judgment due for entry on that day, he could not as a matter of law have been misled.

2. As to the misdescription of the amount of the judgment, it may be repeated that the verdict was upon two causes of action. Upon the first, the jury awarded plaintiff \$128.50; upon the second \$2,509.14. In the notice of appeal the amounts are stated at \$128 and \$2,509.14. It is needless to say that the notice is technically inaccurate in respect to the judgment rendered upon the first cause of action, but we are of the opinion that the inaccuracy is not of such a character as to have misled anyone, and the record of plaintiff's various appearances in the Circuit Court thereafter indicates that he was not uncertain as to what judgment defendant was appealing from.

3. In justice to the attorney for the defendant it is not improper to state that it appears from his affi-

davit, which is not contradicted, that before the entry of the judgment, as it now appears of record, the attorney for the plaintiff served upon him a copy of the judgment which plaintiff proposed to ask the court to enter, and that in this copy the proposed judgment is described and dated exactly as recited in the notice of appeal. While we do not pass upon the efficacy of such an affidavit, as tending to explain a defective notice, it at least relieves counsel for defendant from any imputation of carelessness in preparing his notice.

4. This court has always been liberal in its construction of our appeal statutes, to the end that no one shall be deprived of his right to be heard here, by reason of any mere technicality arising from a strained construction of the statutes, substantial compliance with which is all that ought to be required. The motion to dismiss is overruled.

Counsel for defendant has interposed a counter-motion for leave to file an amended undertaking, complying with the description of the judgment as actually entered, and this motion is allowed.

MOTION TO DISMISS OVERRULED.

MOTION TO AMEND UNDERTAKING ALLOWED.

Affirmed January 6, 1920.

ON THE MERITS.

(186 Pac. 32.)

Department 2.

Chester V. Dolph, an attorney at law, brings this action against Harriet F. Speckart to recover for personal services, pursuant to a written contract. A verdict was rendered in favor of plaintiff and from a judgment thereon defendant appeals.

Several years before entering into this contract defendant had been left a considerable amount of property by her deceased father, Adolph Speckart, who died in Butte, Montana, in 1903, leaving a will by which he devised and bequeathed one third of his property to his widow, one third to defendant and the remaining one third to his son. The shares of the defendant and the son, who were then minors, were to be paid to them when they became twenty-one years of age. They had arrived at that age prior to making this contract. The estate had never been settled nor the defendant's share paid to her. The defendant's mother was appointed executrix of the will of Adolph Speckart and completely administered the estate in Butte, Montana, several years prior to the execution of this contract. Some time before January, 1907, the defendant had demanded from her mother and her uncle, Leopold F. Schmidt, who was the adviser of her mother, her share of the estate. This demand was not complied with, but the uncle, Leopold F. Schmidt, was appointed administrator of the estate of Adolph Speckart, in Olympia, Washington. While these proceedings were pending plaintiff and defendant, on November 28, 1906, entered into a contract for the employment of the plaintiff as defendant's attorney. Under this contract the plaintiff performed services of the value of \$128.50, as claimed in the first cause of action. This is admitted by defendant and there is no issue concerning the same.

On January 12, 1907, plaintiff and defendant entered into another written contract reciting that: The plaintiff desired her attorney to obtain an amicable settlement of defendant's inheritance from the estate of her deceased father, and oppose a distribution of

the estate until such amicable settlement could be obtained, and then providing in part, as follows:

"Now therefore in consideration of the services to be rendered the party of the second part by the party of the first part, in the matter of said administration in said Thurston County, the party of the second part does hereby agree and promise to pay to the party of the first part of all moneys and property which may come to her out of said estate unconditionally and directly, either through said amicable settlement or otherwise, or through said estate in administration in said Superior Court for Thurston County, the following amounts, to wit:

"If there shall be so received by the party of the second part not more than \$65,000, the party of the first part shall receive one and one-half per cent; if there be received more than \$65,000, and not more than \$85,000, the party of the first part shall receive two per cent; if there shall be received more than \$85,000, the party of the first part shall receive two and one-half per cent."

At the same time Harriet F. Speckart signed a letter of instructions in detail, directing the attorney to go to Olympia and protect her interests and obtain an offer of an amicable settlement, if possible, and also secure information as to the value of her interest in the estate. Thereupon, plaintiff went to Olympia and returned with a proposition of compromise which was refused. On January 22, 1907, defendant notified the plaintiff to perform no further services for her and attempted to cancel the contract. The plaintiff refused to consider the contract canceled and notified the defendant that he was ready to perform his part of the same. The defendant employed other attorneys, and in September of that year instituted a suit against her mother and uncle in the United States Circuit Court for the Western Division of the West-

ern District of Washington. In September, 1909, plaintiff brought this action, claiming a commission of two and one-half per cent on \$119,500, which he alleged "that defendant has now received, since said agreement of January 12, 1907, unconditionally and directly, money and property which has come to her out of the estate of her deceased father." The jury allowed the plaintiff the sum of \$2,509.14, or two and one-half per cent of the sum of \$100,365.60.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. E. E. Heckbert*.

For respondent there was a brief and an oral argument by *Mr. Henry J. Bigger*.

BEAN, J.—It is the contention of the defendant that she never received any money or property from her father's estate, within the meaning of the contract with the plaintiff; that the accounting in the federal court has not been completed and that plaintiff under the terms of the contract is not entitled to any compensation at this time. This question is properly raised by a motion for a nonsuit. While this suit was pending in the federal court, defendant's mother, on July 20, 1909, deposited in the registry of that court the sum of \$67,535.74, pursuant to a stipulation made between the respective counsel of Miss Speckart and her mother, which is in part as follows:

"Now, therefore, it is hereby stipulated that said defendant Henriette Speckart, will on or before the 1st day of August, 1909, deposit in said court, all said moneys and other property capable of delivering, which is in part the subject of litigation herein admitted to belong to the complainant, and which is held by said Henriette Speckart, as trustee for the com-

plainant, pending said litigation, or until further order of court; and it is further stipulated that pending the litigation or further order of court, a monthly allowance of \$250 per month, payable on the first day of each month, beginning June 1st, 1907, be paid to the plaintiff out of said fund."

This stipulation was confirmed by an order of court of the same tenor, July 30, 1909. The testimony in the present case also indicated that, pursuant to the stipulation and the order of the court, defendant's mother, as trustee, paid into the court on or about July 30, 1909, certificate No. 36, 3,333 $\frac{1}{3}$ shares of the capital stock of the Olympia Brewing Company; certificate No. 74, 2,056 $\frac{2}{3}$ shares of the capital stock of the Salem Brewery Association; certificate No. 74, 4,814 $\frac{2}{3}$ shares of the capital stock of the Bellingham Bay Brewery; and certificate No. 79, 1,051 shares of capital stock of the Acme Brewing Company. The stocks so deposited were one third of the shares held by the trustee in the different corporations, and certificates therefor were issued to Harriet F. Speckart. The testimony therefore tended to show that the title to the stock passed to this defendant; that she was entitled thereafter to the dividends thereon and that she received such dividends and accepted the shares of stock as her property. On September 14, 1909, pursuant to a stipulation of the parties in that suit the court ordered \$50,000 of the funds in the registry of the court deposited by Mrs. Speckart, to be paid to the complainant, Harriet F. Speckart, said payment to be "without prejudice to the rights of any of the parties to the litigation herein pending," it being admitted, as the stipulation recites, "that the complainant is entitled to receive at least the sum of \$50,000 of the said funds at this time." Under these

stipulations and orders there was paid to the defendant, Harriet F. Speckart, \$57,000, besides the deposit of the certificates of shares of stock. Afterwards the United States Circuit Court, preparatory to dismissing the complainant's bill, ordered the clerk to deliver to Henriette Speckart, the above-mentioned shares of corporation stock and all of the balance of the money on deposit. On account of this order, as we understand, the defendant claims that no right accrued to her by virtue of the shares of stock being deposited in the federal court. That decree, however, was afterwards reversed upon appeal and the cause remanded for the trial court to find the account: *Speckart v. Schmidt*, 190 Fed. 499 (111 C. C. A. 331).

5. In order to prove the value of the brewery stocks the plaintiff produced evidence of *bona fide* sales of stock of each of the corporations, during the summer of 1909, which indicated that the stocks had an aggregate value of \$43,432.05. Counsel for the defendant objected and excepted to the introduction of such testimony. When it becomes necessary to ascertain the value of articles for which there is no open market, evidence of prices realized at sales of such articles held under conditions calculated to secure adequate returns is admissible, provided that the time of sale is not too remote to raise a logical inference: 16 Cyc. 1141 et seq; 13 Ency. of Ev. 512, 528; *Bump v. Cooper*, 20 Or. 527 (26 Pac. 848); *Chaperon v. Portland Electric Co.*, 41 Or. 39 (67 Pac. 928); *Portland v. Investment Co.*, 64 Or. 410 (129 Pac. 756). There was no error in admitting such testimony.

In the present case the trial court charged the jury, in effect, that if the plaintiff was at all times ready, able and willing to carry out the contract and was prevented, without his fault, by defendant from doing

so, then he would be entitled to his compensation. The court said:

"The court further instructs you that the language used in this contract, upon which Dolph seeks to recover, is, namely that 'The party of the second part does hereby agree and promise to pay to the party of the first part, out of the moneys and property which may come to her out of said estate, unconditionally and directly,' and the court charges you that if you find from a preponderance of the evidence in the case that she, in the suit brought by her in the federal court in the State of Washington against her mother and uncle, Leopold Schmidt, prior to the commencement of this action, that is prior to September 24, 1909, caused moneys and property from the estate of her father to be deposited in the registry of said court and said moneys and property were admitted to belong to and to be her property, then such of said moneys and property as were so admitted to belong to her and were deposited as her property and came to her within the meaning of the contract as I have outlined to you, then Dolph in this case is entitled to receive his commission thereon as provided in the contract."

Also:

"You are further instructed if you believe from a preponderance of the evidence in the case that the brewery stocks belonging to her father's estate and delivered by the defendants in the suit commenced by her, Speckart, as complainant, and against her mother and uncle Schmidt, for an accounting, were at her request deposited in the registry of the court in said cause, with the mutual understanding and agreement between all the parties to said litigation that said stocks belong to her, then in that event said stocks came to the plaintiff within the purview of the contract of January 12, 1907, in litigation herein, and became the property of the defendant constituting an accounting as to said property so deposited, and the

plaintiff herein would be entitled to his commission thereon as stipulated in the contract."

To these instructions exceptions were duly saved by counsel for defendant. Defendant requested the court to instruct the jury that the evidence showed that the plaintiff was not entitled to recover from the defendant under the contract, until the defendant shall have received certain sums of money, or certain property directly and unconditionally, and that there is no evidence in the case showing that the defendant has so received any money or property. To the refusal to so instruct the jury, counsel for defendant saved an exception.

Upon the trial of the cause defendant offered to prove by the testimony of her attorney, J. W. Robinson, that the defendant's mother, at the time of the proceedings in the federal court, contended that the amount of \$57,000, which had been paid the defendant under the stipulation of September 13, 1909, and the order of the court of the same date, was not the correct amount and that part of it should be refunded.

6-9. From an examination of the stipulation and order, quoted in part above, it will be readily seen that the evidence tendered was in direct conflict with the written stipulations of the parties, upon which the order of the court was based. For this reason the trial court properly excluded the testimony. A further reference to the stipulation also discloses that it was plainly agreed, in the federal court, that the complainant therein, Harriet F. Speckart, the defendant herein, was entitled to receive at least \$50,000. There is no dispute, as we understand, but that she received at least \$7,000, as monthly allowances. The purport of the stipulation was that the \$67,535.74 was the largest amount Henriette Speckart represented

could be allowed her daughter, by the court, but she unreservedly added that her daughter was entitled to receive at least \$50,000 from her father's estate. Should the plaintiff defer his action until the rendition of the account by Henriette Spéckart in the federal court is completed, the amount received by defendant might be enlarged. We do not understand that the amount could be reduced below \$50,000. The clause contained in the stipulation "said payment to be without prejudice to the rights of any of the parties to this suit," refers to litigation as to the balance of the fund, and not to the \$50,000 paid to defendant nor to the \$7,000 paid her as monthly allowances. The court, in effect, so charged the jury and we approve the charge. The learned author of Black's Law Dictionary defines "without prejudice," page 1243, as follows:

"Where an offer or admission is made 'without prejudice,' or a motion is denied 'without prejudice,' it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except so far as may be expressly conceded or decided."

It seems that Henriette Speckart was to deposit the property "admitted to belong to the complainant [Harriet F. Speckart], and which is held by said Henriette Speckart, as trustee for the complainant"; that certificates for the one-third part of the shares of stock, belonging to the estate of the defendant's father, were issued to Harriet F. Speckart as shown by the books of the several corporations and that dividends were paid thereon and received by defendant. Therefore the jury might fairly infer that such shares of stock were accepted by the defendant as her property. That they were permitted to remain

in the registry of the court we do not deem material. Such a repository would not change the ownership. This disposition of the shares of stock, so long as they were the property of the defendant, according to the finding of the jury made pursuant to the tenor of the testimony, was of the same force and effect as though such shares had been lodged in a bank for defendant and the dividends thereon had been credited to her account. The dry wave which has swept over the country renders the consideration as to the brewery stocks something in the nature of a *post-mortem* examination. Pursuant to the contract made between plaintiff and defendant, in regard to plaintiff's commission, we think the court was right in admitting testimony as to the value of the stocks at the time they were issued to defendant.

To restate as we read the record, the testimony, if believed by the jury, proved that the defendant, Harriet F. Speckart, received in money and property out of the estate of her deceased father, "unconditionally and directly," the amount upon which the jury computed the commission of plaintiff.

10-13. Written contracts should be construed from the standpoint of the parties when they were contracting and be so interpreted as to give effect to all the provisions, if possible: *Hildebrand v. Bloodsworth*, 12 Or. 75 (6 Pac. 233); *Arment v. Yamhill County*, 28 Or. 474 (43 Pac. 653); *Duniway v. Hadley*, 91 Or. 343 (178 Pac. 942). A party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong, by insisting on proof which by reason of his breach is unobtainable: *In re Stern*, 116 Fed. 604-608 (54 C. C. A. 60); *Allen v. Field*, 130 Fed. 641-653 (65 C. C. A. 19); *Critchfield v. Julia*, 147 Fed. 65-73 (77 C. C. A. 297). Where

one employs an attorney and makes an express valid contract stipulating for the compensation which the attorney is to receive for his services, such contract is, generally speaking, conclusive as to the amount of such compensation. A client has the unquestionable right to terminate the relationship between himself and his attorney, yet where an attorney is prematurely discharged by the client, or is otherwise wrongfully prevented from performing the professional duties for which he was employed, without fault on the part of the attorney, the latter is entitled to compensation. This is so even though the arrangement was for a contingent fee, provided the contingency has happened. The client, by wrongfully preventing the performance of the acts which entitled the attorney to the specific compensation, becomes liable in damages in such amount: 2 R. C. L., p. 1047, § 129, and p. 1049, § 131; 6 C. J., p. 724, § 292; *Reynolds v. Clark County*, 162 Mo. 680 (63 S. W. 382); *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218 (21 Pac. 743, 12 Am. St. Rep. 139). The motion for a nonsuit was rightly denied.

In the case of *Larned v. City of Dubuque*, 86 Iowa, 166 (53 N. W. 105), the Supreme Court of Iowa had under consideration a contract similar to the one in the case at bar. That court said:

"The full performance of the contract on the part of intervener was prevented by Mrs. Porter, and she cannot thus rob intervener of the benefits of the contract which would have accrued to him in case he had been permitted to fully perform on his part. Her act in settling with the defendant city was a waiver of her right to insist on the collection of the full amount of the bonds and interest, as a prerequisite to his receiving the compensation provided in the contract."

The testimony indicated and the jury evidently found that full performance of the contract on the part of the plaintiff was prevented by the defendant. She should not be allowed to thus deprive the plaintiff of the benefits of the contract which would have accrued to him in case he had been permitted to fully perform on his part, as he was ready, able and willing to do: *Brodie v. Watkins*, 33 Ark. 545 (34 Am. Rep. 49-51); *Scheinesohn v. Lemonek*, 84 Ohio St. 424 (95 N. E. 913, Ann. Cas. 1912C, 737, and note at page 741). In *Webb v. Trescony*, 76 Cal. 621 (18 Pac. 796), the court says:

“Where, from the nature of the contract, as in this case, no possible mode is left for ascertaining the damage, we will have presented the anomalous case of a wrong without a remedy, unless we adopt the only measure of damages which remains, and that is the price agreed to be paid.”

This rule is invoked where the defendant not only breaks the contract but also deprives the plaintiff of showing the amount of injury under the general rule. By reason of this, the defendant ought not to complain that a different rule is invoked when it is the only way of making her responsible for her lack of good faith. See, also: *Carlisle v. Barnes*, 102 App. Div. 573 (92 N. Y. Supp. 917); *Coffee v. Meiggs*, 9 Cal. 364; *Tyler v. March*, 1 Day (Conn.), 1; *Steinberg v. Gebhardt*, 41 Mo. 520; *Danley v. Williams*, 16 Wis. 581; *Moyer v. Cantieny*, 41 Minn. 242 (42 N. W. 1060, 1061); *Kersey v. Garton*, 77 Mo. 645; *Shannon v. Comstock*, 21 Wend. 457 (34 Am. Dec. 262).

14, 15. It was the duty of the trial court to construe the written stipulation and orders in the federal court pertaining to the matter. This the learned trial judge did and plainly charged the jury in regard thereto.

The case was fairly submitted to the jury. The jury found for the plaintiff. Under our Constitution, where there is any competent evidence to support such a verdict, we are precluded from disturbing the same.

Finding no error in the record, the judgment of the lower court is affirmed. AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued at Pendleton October 30, 1919, affirmed January 6, 1920.

CALDWELL v. HOSKINS.

(186 Pac. 50.)

Trial—Instructions Covered by Those Given Properly Refused.

1. Where the instructions given fully covered every point embraced by the requested instructions, they were properly refused.

Trial—Motion to Strike Covering Objectionable Testimony Only Properly Granted.

2. Proceedings at trial held to show that plaintiff's motion to strike defendant's testimony and the court's ruling thereon went to the exclusion only of defendant's narration of her conversation with physician, and did not exclude her conversations with plaintiff containing a competent admission by plaintiff.

Evidence—Admission by Victim of Automobile as to Speed Admissible.

3. In an action for injuries by automobile, plaintiff's statement in conversation with defendant that, had defendant been driving faster, he would have been by before plaintiff got to the place of collision, was admissible.

New Trial—Newly Discovered Evidence That X-ray did not Disclose Alleged Fracture not Ground for New Trial.

4. A new trial was not required by newly discovered evidence that several months after plaintiff was injured by defendant's automobile she was X-rayed and informed that her rib was not broken nor spine twisted, where the evidence showed that the automobile knocked plaintiff down while it was on the left-hand side of the street, and that she was dragged or rolled a considerable distance, and was severely shocked and bruised, and was confined to a hospital some time.

New Trial—Plaintiff Severely Injured did not Wrongfully Suppress Evidence by not Offering X-ray not Showing Alleged Fracture.

5. Where plaintiff was knocked down by an automobile and dragged a distance, was painfully and severely injured, confined to the hospital for some time, and the physician who first examined her did not discover a broken rib or twist of spine to which her subsequent attending physician testified, plaintiff, by not offering an X-ray taken several months after the injury not showing the stated injuries, did not wrongfully suppress evidence so as to entitle defendant to new trial.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

This is an action to recover damages for personal injuries caused by an automobile. There was a judgment for the plaintiff; the defendants filed a motion for a new trial which the court denied; and the defendants appealed.

Court Street runs east and west through Pendleton and is intersected by Beauregard Street which extends north and south. On December 24, 1917, at about 5:45 P. M. the plaintiff was walking towards the east along the sidewalk on the north side of Court Street on her way to her home which was located on Court Street but beyond and east of Beauregard Street, so that it was necessary for her to cross Beauregard Street. There was no light burning at the intersection of Court and Beauregard Streets. It was very dark, according to some of the testimony. Court Street, including the area of its intersection with Beauregard Street, is paved; but Beauregard Street is not paved. The edge of the pavement across Beauregard Street "lines up" with the north side of the sidewalk along Court Street. Near the edge of the pavement on the east side of Beauregard Street was a "mud hole" which "reached about halfway to the middle of the street"; and the witnesses say that after leaving the pavement Beauregard Street was "muddy."

J. T. Hoskins and Cora H. Hoskins are husband and wife and Vashti Hoskins is their daughter. The home of the defendants was located on the west side of Beauregard Street and in the second block north of Court Street. The defendants were returning from the country in an automobile driven by the daughter. They drove along Court Street until they came to Beauregard Street, when they turned to their left with the purpose of going north along Beauregard Street to their home. At the moment when the defendants turned into Beauregard Street the plaintiff was crossing that street and was struck by the automobile.

The plaintiff alleged that the defendants drove along the north side of Court Street and while going "at a dangerously high rate of speed" turned into the left-hand side of Beauregard Street and struck her while she was "using the extreme west side of Beauregard Street as a pedestrian." The defendants averred that they drove along the south side of Court Street until they reached Beauregard Street when they turned the automobile "in a northerly direction," but "east of the center" of the street intersection, and, while "traveling at a speed of about 8 miles per hour" and when the automobile "was about to enter the said Beauregard Street," the plaintiff suddenly appeared on the east of the center line of Beauregard Street and was struck by the automobile notwithstanding prompt efforts made by the defendants to avoid the accident.

After having been struck by the automobile the plaintiff was picked up and carried into the near-by home of R. T. Hales where she remained about "half an hour," and then she was taken to the hospital. About 5 o'clock "the next evening" she was removed to her home, where "she was in bed 2 months"; but

at the end of 3 months, she was able to resume work in a laundry.

AFFIRMED.

For appellants there was a brief over the names of *Mr. James A. Fee, Mr. Charles Z. Randall* and *Mr. R. I. Keator*, with oral arguments by *Mr. Fee* and *Mr. Randall*.

For respondent there was a brief over the name of *Messrs. Raley & Raley*, with an oral argument by *Mr. James H. Raley*.

HARRIS, J.—1. Four of the assignments of error relate to the refusal of the court to give certain requested instructions. The bill of exceptions contains recitals to the effect that each of these four requested instructions was refused “on the ground that the same was covered by other instructions.” An examination of the charge to the jury discloses that the instructions as given fully covered every point embraced by the requested instructions; and, moreover, the language used by the court was so clear and fair and plain that the jury must have understood and appreciated the meaning and extent of every rule of law submitted to them for their guidance.

2. Another assignment of error related to a ruling on a motion to strike out certain testimony given by Cora Hoskins, one of the defendants. Cora Hoskins and her brother, E. R. Baker, called on the plaintiff shortly after her removal to the hospital and a conversation occurred between Cora Hoskins and the plaintiff in the presence of E. R. Baker and the plaintiff’s mother, Mrs. Belinda Collins. The question to be decided will be better understood if the following portion of the record is first read:

"Q. State whether or not you ever visited her at the hospital while she was there?

"A. Yes, sir, within just about half an hour I judge after she was up there my brother came up to our house. * *

"Q. Who is your brother?

"A. Irvin Baker. And I asked him if he would go with me to the hospital to see this woman and he said yes and we went up and I went in and asked her if I could do anything for her. She seemed kind of cross at me but her mother was not. She was very friendly with us, and I said to her if we had been going fast I said you would have been hurt real bad. She said if you had been going fast you would have been past when I got there and I told her to stay there as long as she wanted to and I would see that it was paid. I also told Dr. Parker the same. I told him to wait on her just as long as she needed him.

"Counsel for plaintiff moves to strike out all that answer of the witness as not tending to prove or disprove any of the issues of the case and incompetent.

"The Court: So far as the testimony of Dr. Parker is concerned the testimony is allowed. The motion is allowed.

"Q. Is this something you told the woman herself?

"A. Yes, sir."

It will be observed that the answer of the witness is really a narrative of three different conversations with three different persons, for it tells about: (1) Her talk with her brother; (2) her conversation with the plaintiff while at the hospital; and (3) her statement to Dr. Parker. The defendants contend that the wording of the motion included all the answer of the witness and that the jury must have understood from the language of the court that the entire answer, including the alleged statement of the plaintiff that "if you had been going fast you would have been past when I got there" was stricken out. The plaintiff claims, on the other

hand, that after the words "it was paid" there was "a pause in the answer and apparently upon second thought the witness concluded to add something further" and then told what she had said to Dr. Parker. The defendant challenges the claim that there was any such pause in the answer, and of course it is impossible for us to determine from a mere paper record, which purports to do no more than to inform us of the words which fell from the lips of persons, whether there was a pause in the answer as claimed by the plaintiff. However, if the objection made by plaintiff was directed against that portion of the answer only which referred to Dr. Parker the language employed by the plaintiff was adequate for the purpose, especially if the word "that" was emphasized by a rising inflection. Indeed, the language employed was not at all unusual or extraordinary. While other expressions might have been used, and although the words "that answer" are broad enough to include the whole answer, yet they are the words which many lawyers would naturally employ when moving against only a part of an answer. It is perfectly clear from a reading of the record that when the trial judge said "so far as the testimony of Dr. Parker is concerned the testimony is allowed," it was a "slip of the tongue"; for he immediately corrected himself and said "the motion is allowed," obviously meaning that "so far as the testimony of Dr. Parker is concerned the motion is allowed." This view finds confirmation in a subsequent portion of the record. E. R. Baker was called as a witness for the defendants and on direct examination he told about accompanying his sister to the hospital, and when asked to relate the conversation which occurred between his sister and the plaintiff he answered as follows:

"Mrs. Hoskins asked how she was and she told her, and she says it is a good thing we were driving slow or you might have been hurt much worse, Mrs. Hoskins said to Mrs. Caldwell, and Mrs. Caldwell kind of raised up in bed a little and looked around and she said 'Well if you had been driving faster you would have been by before I got there.'"

3. If the attorney for the plaintiff had intended to move against the whole answer given by Mrs. Hoskins, or if the trial judge had intended to strike out all the answer of Mrs. Hoskins, we would naturally expect a motion by the plaintiff to strike out the answer given by Baker and a ruling of the trial judge allowing the motion; but no objection was made to the question or answer. It must be conceded that the defendants were entitled to show that the plaintiff stated "if you had been going fast you would have been past when I got there," if she did so state, because such a declaration would be in the nature of an admission that the defendants were not going fast. The plaintiff did not deny making the statement, while E. R. Baker said that she did make it; and we think that it is sufficiently clear from the record that the court struck out only that part of the answer of Cora Hoskins which refers to Dr. Parker and that it was so understood by the jury; and that therefore the defendants had the benefit of the testimony of Cora Hoskins concerning the alleged admission of the plaintiff.

4. The most important assignment of error arises out of an X-ray examination of the plaintiff. As a preliminary to the discussion of this branch of the case, we may with propriety refer to some of the evidence concerning the exact place where the plaintiff was when struck, the speed at which the defendants were going, and the injuries sustained by the plaintiff. As already

stated the plaintiff claimed that the defendants turned into Beauregard Street on the west side of the street and that she was struck when near the west side of Beauregard Street; while the defendants insisted that when they turned to enter Beauregard Street they were east of the middle of that street. Both the driver of the automobile and J. T. Hoskins admitted that they "aimed to go to the left of the mud hole," which according to the testimony of Charles Hoskins, a son of J. T. Hoskins and Cora Hoskins, "reached about half-way to the middle of the street." The cement sidewalk on the north side of Court Street projects into Beauregard Street for a distance of 10 feet from either side of the street, so that the distance across Beauregard Street between these ends of the sidewalk is 30 feet.

The plaintiff testified that "the car struck me and knocked me down and ran over me, and I went between the wheels" and "I was rolled over and over under the car." R. T. Hales and Charles Daniels were standing on the parking in Court Street in front of the former's house when the accident occurred, and, according to their testimony, they reached the plaintiff before any of the defendants were able to get out of their car and go back to where the plaintiff was lying. The plaintiff was found "lying almost on her back, a little bit on her left side in the mud." Hales and Daniels said that the place where they found plaintiff was 2 feet west of the middle line of the street and 27 feet north of the edge of the pavement; and that the rear of the car was 35 feet north of the place where they found the plaintiff.

Hales testified that after the plaintiff was carried into his house she "complained of being sick at her stomach." There was evidence from which the jury

could have concluded that the plaintiff was dazed or even unconscious when she was taken into the Hales house. The plaintiff testified, when telling about the accident, as follows:

"And I was hurt inside I knew, but I didn't know how bad. I felt as though I was tore loose inside some place, and I thought my head was broken open or that my head was broken off my neck and my elbows was bruised and scratched up and skinned and my knees, my clothing on my knees was cut, and my stockings and my underwear was cut and tore, and my knees were all skinned up and I was black and blue from the back of my head down the right side"; and "I was in terrible agony."

When asked to describe "the effects from that injury at the present time" the plaintiff testified as follows:

"My side hurts me, my rib hurts me, and my side in there hurts me, and I can't walk very fast or very much because my side hurts me and my rib and side all the way up here; my rib is broken and it bothers me all the time."

Mrs. Belinda Collins, who nursed the plaintiff, testified that the back of plaintiff's head was bruised and that she "seemed to suffer so much from her head down to her shoulders to her waist line, that seemed to be her main trouble, and pain in the side here."

Dr. Parker looked plaintiff "over slightly" at the Hales house; but after her removal to the hospital he made a thorough examination and did not discover "any injury to the spinal cord or column rather, or to the ribs"; and when asked "if she had had a severely broken rib at that time, or an injury to the spinal column would your examination have disclosed it?" He answered thus: "Possibly it would, yes, sir. I would imagine if it had been very serious."

J. L. Hoisington, an osteopathic physician who had practiced his profession in Pendleton for 14 years, was called to see the plaintiff on December 29, 1917, and from that time on was the attending physician. This witness testified as follows:

"I got the history of the case somewhat, and what observation I could observe at the time, and found, first I noted what I term nervous shock, judging it from her depression and weakness, for what I could see no physical cause for, and in addition to that I found her very sore at a number of points, especially the right side; and on examination I found what I classed at that time as a broken rib, the eighth rib was broken in the axillary line. The condition at the head of the rib and vertebrae from which it comes was too tender at that time to make a complete examination and all my information of that was gotten by later examinations and at a subsequent time when I got the tenderness out so I could make the examination. The spine was twisted between the eighth and ninth vertebrae and it is a twist that still remains."

The motion for a new trial which the defendants filed and the court denied was based upon affidavits to the effect that a few minutes before the jury returned the verdict the attorneys for the defendants learned of a rumor that the plaintiff had caused an X-ray photograph to be taken; that there was no opportunity to verify the rumor until after the verdict was received; that afterwards upon making inquiry the defendants ascertained that on June 22, 1918, the plaintiff went to Dr. Boyden, of Pendleton, who on that date took an X-ray photograph of her spinal column and ribs, and that "said photograph showed that there had never been any injury to the spine and ribs of plaintiff"; and that after the photograph was taken Dr. Boyden "informed plaintiff personally that she had not sustained any injury to her spine or ribs."

The defendants contend that a new trial should have been granted because, they argue, (1) the plaintiff was guilty of misconduct in suppressing and concealing the X-ray examination; and (2) the X-ray examination, in the circumstances already stated, constituted newly discovered evidence which the defendants could not with reasonable diligence have discovered and produced at the trial.

The verdict of the jury forecloses debate as to whether the defendants were or were not guilty of negligence as charged in the complaint. The jury could not have found for the plaintiff without having first decided that the defendants had been negligent; and, therefore, the plaintiff was entitled to a verdict for some amount of money if she was injured at all. We need not and do not attempt to decide the extent of the injuries sustained by the plaintiff, and yet we may fairly infer, from the fact that the verdict was for the plaintiff, that the jury believed the testimony of Hales and Daniels, who for aught that appears in the record were disinterested witnesses, when they said that the plaintiff was lying in the mud 27 feet from the pavement upon which she was walking when first struck by the automobile, and that the car, which the driver testified was stopped "as soon as possible," was 35 feet north of the place where the plaintiff was found. In other words, notwithstanding the fact that the driver of the automobile applied the brakes promptly upon discovering the presence of the plaintiff, she was thrown and rolled and dragged at least 27 feet and the car was not stopped until it had gone 35 feet farther or a total distance of 62 feet from the pavement. The mere statement of these facts at once suggests inevitable injury to the plaintiff in some degree, and, in the light of all the testimony, it would be difficult to

understand how the jury could have avoided awarding a verdict for more than a nominal amount, even though it is assumed that the plaintiff's rib was not broken and that her spine was not "twisted." In this view of the situation, the evidence about the rib and spine affected the amount of the verdict rather than the right to a verdict.

The X-ray examination was not made until June 22, 1918, or 6 months after the date of the injury. The X-ray photograph was not made a part of the record nor exhibited to the trial judge. There is no affidavit by Dr. Frank Boyden, notwithstanding the fact that plaintiff testified as a witness in her own behalf and by doing so consented that the physician might testify as a witness: *Forrest v. Portland Ry., L. & P. Co.*, 64 Or. 240 (129 Pac. 1048). While we do not intend to decide whether the trial judge could have compelled the plaintiff to submit to an examination upon the application of the defendants, yet we may with propriety note the fact that the plaintiff was not requested to permit physicians chosen by the defendants to examine her condition, and, so far as the question of injury was concerned, the defendants were apparently willing to rest their whole case on the testimony of Dr. Parker and one of the nurses at the hospital. Dr. Hoisington did not attempt to testify as to the extent to which any rib was broken. The plaintiff was a witness in her own behalf and she was cross-examined. The defendants had ample opportunity to inquire as to whether or not any other physician had examined her and whether an X-ray photograph had been taken; and yet no such inquiries were made. In view of the fact that the defendants did not take full advantage of the opportunities offered by cross-examination and in view of the other facts shown by the record, we do not think that

we would be justified in reversing the trial court and holding that he should have allowed a new trial on the ground of newly discovered evidence: *McClendon v. McKissack*, 143 Ala. 188 (38 South. 1020); *Morrison v. Carey*, 129 Ind. 227 (28 N. E. 697).

5. Section 174, subdivision 2, L. O. L., provides that a new trial may be granted on account of "misconduct of the jury or prevailing party." If during the course of a trial it appears that evidence has been willfully suppressed, the opposing party is given the benefit of the disputable presumption that the suppressed evidence would be adverse to the party suppressing it: Section 799, subd. 5, L. O. L. We may assume, for the purposes of the discussion, that, if after a trial it is ascertained that the prevailing party has willfully suppressed evidence, it amounts to misconduct within the meaning of Section 174, L. O. L. But can it fairly be said that the plaintiff was guilty of suppressing evidence? The plaintiff knew whether she suffered any pain and she also knew where the seat of the pain was. So overwhelming is the evidence, that it may be said to have conclusively established that she suffered pain in the side. The physician who examined her on the evening of the accident stated that he did not discover any broken rib or twisted spine. The physician who called upon her five days afterwards and from that time on acted as her attending physician testified that her rib was broken and that her spine was twisted. The X-ray photograph was not taken until 6 months after the accident and, for aught that appears in the record, the broken rib, if there was one, may have completely united, leaving no evidence of a former break. We are not advised as to whether medical men would say that a break either sometimes or always leaves evidence of the break which an X-ray photograph will in-

variably picture; nor do we know how serious the break must be in order to leave permanent evidence of the fracture. If the plaintiff's rib was broken, it may be that it was a slight break and no evidence of the fracture remained on June 22, 1918, when the X-ray photograph was taken. The plaintiff was not bound to believe the opinion of the physician who took the X-ray photograph 6 months after the accident; but knowing that she actually suffered pain and having been told by her attending physician that her rib was in truth broken, she had a right to believe, as she undoubtedly did, that her rib was broken; and she was under no obligation to call Dr. Boyden as a witness merely because his opinion based upon an examination made 6 months after the injury differed from the opinion of Dr. Hoisington. On the whole record we think in the language of the constitutional amendment, Article VII, Section 3, "that the judgment of the court appealed from was such as should have been rendered in the case"; and therefore we conclude that the judgment appealed from ought to be and it is affirmed.

AFFIRMED.

Argued June 6, affirmed July 29, 1919, rehearing denied January 13, 1920.

NICKELL v. BRADSHAW.*

(183 Pac. 12.)

Pleading—Cure of Defect by Subsequent Pleading.

1. Where complaint correctly set forth note sued upon, except that it omitted one phrase, but answer set forth note correctly and reply admitted such portion of answer, *held*, that pleadings, construed together, referred to note introduced in evidence.

*For a discussion of the question as to provision accelerating maturity as affecting negotiability of bill or note, see notes in 35 L. R. A. (N. S.) 390; L. R. A. 1915B, 472. **REPORTER.**

Bills and Notes—Presentment—Sufficiency of Evidence.

2. Conflicting evidence *held* to make a jury question whether note sued upon was in a bank's possession for presentment on day note fell due, as required by Section 5904, L. O. L., or in plaintiff's lock box in bank.

Bills and Notes—Presentment—Sufficiency.

3. Under Sections 5905, 5920, L. O. L., relating to presentment of negotiable instruments for payment, a note payable at a bank is sufficiently presented if it is in bank at date of maturity ready to be delivered by bank to the proper person upon payment being made.

Bills and Notes—Payment—Authority.

4. Possession at time and place of payment of a note properly indorsed is *prima facie* evidence of authority to receive payment.

Bills and Notes—Negotiability—Time for Payment.

5. Under Sections 5834, 5837, L. O. L., defining negotiable instruments, etc., a note payable five years from date and containing the clause, "due if ranch is sold or mortgaged," is not rendered non-negotiable by quoted words.

Bills and Notes—Time for Payment—Construction.

6. Where a note payable five years from date contains the clause, "due if ranch is sold or mortgaged," the quoted clause is not self-executing, but merely confers option upon holder to treat debt as due if contingency occurs.

Bills and Notes—Complaint—Time for Payment.

7. Where a note payable five years after date contained a clause making it due if the maker's ranch was sold or mortgaged, a plaintiff relying upon expiration of five-year period need not allege or prove that ranch had not been sold.

Evidence—Parol Evidence—Contemporaneous Agreement.

8. Parol evidence that indorser and indorsee of a note agreed that indorsee would enforce payment only from maker is incompetent because contradicting the written contract of indorsement.

Bills and Notes—Burden of Proof—Notice of Dishonor.

9. The holder of a note has burden of proving that notice of dishonor was mailed within the time prescribed by Section 5937, L. O. L.

Bills and Notes—Notice of Dishonor—Sufficiency of Evidence.

10. Evidence that written notice of dishonor was postmarked during afternoon of following day does not establish a compliance with Section 5937, L. O. L., requiring deposit in postoffice in time to go by mail on day following day of dishonor, etc., since there is no proof regarding time of outgoing mails.

From Jackson: FRANK M. CALKINS, Judge.

Department 1.

Belle Nickell brought this action against R. H. Bradshaw, as the maker, and against Effie May Terrill, as an indorser of a promissory note. Bradshaw made no appearance and there was a judgment against him for the amount of the note; but as between Belle Nickell and Effie May Terrill there was an involuntary judgment of nonsuit against Belle Nickell. The plaintiff appealed.

On August 9, 1910, R. H. Bradshaw delivered to Effie May Terrill his promissory note which reads as follows:

“\$2000. Medford, Oregon, Aug. 9th, 1910.

“Five years from date without grace, I promise to pay to the order of Effie May Terrill for value received, with interest from date, payable Annually at the rate of 6 per cent. per annum, until paid, principal and interest payable in U. S. Gold Coin, at Farmers and Fruitgrowers Bank of Medford, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the Court may adjudge reasonable as attorney's fees in such suit or action.

“R. H. BRADSHAW.

“Due if ranch is sold or mortgaged.”

Charles Nickell is the husband of Belle Nickell; and Charles E. Terrill is the husband of Effie May Terrill. On March 26, 1912, Belle Nickell traded 160 acres of land, owned by her, for the note held by Effie May Terrill. The land was valued at \$1,600 and Belle Nickell and her husband executed and delivered to Effie May Terrill a note “for \$400 for the difference.” This note signed by the Nickells was afterwards paid by them. All the negotiations for the “trade” were conducted by Charles Nickell as the agent of Belle Nickell and by Charles E. Terrill as the agent of his wife.

The inference to be drawn from the record is that all the negotiations for the "trade" as well as the consummation of it were carried on in Medford. Effie May Terrill resided in Brownsboro, Jackson County, and was not present during any of the negotiations nor at the close of the transaction. When the Bradshaw note was delivered to Charles Nickell, as the agent of his wife, there was an indorsement on the back of the paper showing the payment of interest to August 9, 1911, and immediately beneath that writing the name "Effie May Terrill" was written. The undisputed evidence is that Effie May Terrill placed the note in her lock-box in a Medford bank and that it remained there until it was delivered to Charles Nickell. The uncontradicted testimony of Effie May Terrill is that, although the name upon the back of the note was her genuine signature, she had written her name on the note some time before the negotiations for the "trade."

On July 24, 1915, Charles Nickell and his wife were in Berkeley, California, and on that date the former, writing from Berkeley, addressed a letter to Charles E. Terrill, inquiring as to the whereabouts of Bradshaw and saying that "his note will soon be due." Nickell returned to Medford shortly after writing to Terrill and did not receive an answer from Terrill until after he had returned to Medford. Not knowing the whereabouts of Bradshaw, about ten days or two weeks before August 9, 1915, and while still in Berkeley, Nickell wrote two letters to Bradshaw, addressing one to him at Medford and the other to him at Brownsboro, telling him that "the note would become due on a certain date and to go and pay it." Charles Nickell testified that he did not present the note to Bradshaw personally, but that "I just left it at the bank where he should pay it and told him about it being there." Charles Nickell

stated on direct examination that the note "has been in mine and my wife's possession since it was received from Charles E. Terrill; and upon being recalled the witness was asked by counsel for plaintiff whether he made demand upon Bradshaw for payment the next day after the note became due; and he answered thus:

"Yes, the next day. This note was at the bank [Farmers and Fruitgrowers' Bank] there all of the time and it was only withdrawn sometime afterwards from the bank and in fact he was notified to appear at the bank and pay it."

Charles Nickell was further asked:

"You say this note was at the Farmers and Fruitgrowers' Bank up to the time it became due?" and he answered "yes."

On August 10, 1915, Charles Nickell wrote and Belle Nickell signed a letter addressed to Effie May Terrill at Brownsboro, as follows:

"You are hereby notified that the note drawn in your favor by R. H. Bradshaw under date of August 9, 1910, for \$2,000.00, payable at the Farmers & Fruitgrowers Bank at Medford, Oregon, five years after date, with interest at 6% per annum, and subsequently indorsed by you and sold and transferred to me by you before maturity for a valuable consideration, was dishonored and not paid by said R. H. Bradshaw, the maker, at maturity, after due presentation.

"I now make demand upon you that you pay said note and accrued interest at the Farmers & Fruitgrowers Bank at Medford, Oregon, at once.

"BELLE NICKELL.

"Dated this 10th day of August, 1915."

This letter was deposited in the postoffice in Medford and was received by Effie May Terrill at Brownsboro.

The complaint alleges that R. H. Bradshaw gave his promissory note to Effie May Terrill on August 9, 1910, and that afterwards, before the maturity of the note, the latter indorsed it to the plaintiff; that "at the maturity thereof" the note was "duly presented to the said defendant, R. H. Bradshaw, the maker thereof for payment and payment thereof demanded; but the same was not paid nor was any portion thereof, of all which due notice was given to the said defendant, Effie May Terrill, the said indorser thereof, and payment thereof demanded of the said defendant, Effie May Terrill, the said indorser." The complaint sets out a purported copy of the note sued upon; but a comparison of the complaint with the promissory note executed by Bradshaw discloses that the recitals in the complaint agree with the original note except that the complaint omits the words "Due if ranch is sold or mortgaged."

Effie May Terrill denied all the allegations of the complaint except as "specifically alleged" in the answer. In passing it is proper to add that the denials were based, in part, on the theory that the complaint recited a note different from the one which the respondent had transferred to the plaintiff. The answer recites the execution and delivery of the note from Bradshaw to Effie May Terrill and this pleading contains an accurate copy of the whole note. The answer also contains two separate defenses. In the first separate defense it is stated, in substance, that the Bradshaw note was delivered to and accepted by the plaintiff upon an agreement by her—

"To look entirely to the defendant Bradshaw for the payment of the same, without any claim upon this defendant for liability for any portion of said note, principal or interest, or attorney's fees. * * That in said transaction plaintiff accepted said note as the obligation of the defendant Bradshaw only, relieving this de-

defendant from any liability thereon in the event of nonpayment, and without any other understanding, legal, implied or otherwise that this defendant would become the guarantor or indorser thereof."

In the second separate defense it is recited that when Bradshaw gave the note to Effie May Terrill he was the owner of a ranch in Jackson County,—

"of large acreage and of great value, and so long as said ranch remained the property of the said Bradshaw and was not too largely mortgaged or encumbered said note was easily collectible out of said ranch; that for said reason it was stipulated as a part of said transaction that if said ranch should be sold or mortgaged said note should mature, so that this defendant might protect herself in the collection of said note."

Effie May Terrill further alleged that at the time of the transfer of the note to Belle Nickell the Bradshaw ranch was mortgaged but that the

"encumbrance was small as compared with the value of said ranch and had been put on by the consent of this defendant, as this defendant advised plaintiff at the time of the sale of said note."

The second separate defense concludes with the following paragraph:

"That thereafter on or about the 18th day of January, 1913, the defendant Bradshaw sold said ranch to Frederick T. Lewis, of which fact the plaintiff had knowledge, and on or about the time of said transaction and for more than one year prior to any notice of nonpayment to this defendant and for more than one year prior to any demand upon this defendant for the payment of said note or any part thereof. By the terms of said note and by reason of said transaction the said note, * * became due and owing more than one year prior to any notice of nonpayment or demand for payment by plaintiff on defendant."

The reply opens by explaining that the words "due if ranch is sold or mortgaged" were inadvertently omitted from the complaint. The reply denies that the Bradshaw note was transferred to the plaintiff upon an agreement by her to look to Bradshaw only for payment of the note; and this denial is followed by an affirmative allegation that it was agreed that the "plaintiff should not look entirely to the said defendant R. H. Bradshaw for the payment of the said note * * but that the said defendant Effie May Terrill should indorse the last described note unrestrictedly."

The plaintiff admits the sale to Frederick T. Lewis but attacks the second separate defense by averring that the words "due if ranch is sold or mortgaged" were intended to give Effie May Terrill "the option only to declare the said note due in the event the said defendant Bradshaw should sell or mortgage the ranch referred to in said promissory note"; that Effie May Terrill waived her right to exercise the option to declare the note due by consenting on October 8, 1910, to a conveyance of the north half of the ranch from Bradshaw to Mrs. M. D. Harbaugh for \$4,000 and by consenting to the execution of a mortgage in 1911 on the south half of the ranch for \$3,120 by Bradshaw to H. M. McFarland.

AFFIRMED.

For appellants there was a brief over the names of *Mr. James E. Fenton*, *Mr. W. E. Crews* and *Mr. W. D. Fenton*, with an oral argument by *Mr. W. D. Fenton*.

For respondent there was a brief and an oral argument by *Mr. Alfred E. Reames*.

HARRIS, J.—1. The respondent argues that the note introduced in evidence is not the instrument described in the complaint and upon which the action is

brought. The note recited in the complaint is an exact copy of the instrument received in evidence except that the words "due if ranch is sold or mortgaged" are omitted from the former. The answer denies all the allegations of the complaint but this denial is qualified by the words "except as hereinafter specifically alleged." Immediately following this qualified denial is paragraph one in which it is affirmatively alleged that on August 9, 1910, R. H. Bradshaw made and delivered to Effie May Terrill his promissory note. This allegation is then followed by an exact copy of the note which was introduced in evidence. In the reply the plaintiff expressly admits the allegations in paragraph 1 of the answer and this admission is then followed by an explanation to the effect that through inadvertence the words "due if ranch is sold or mortgaged" were omitted from "the copy of said promissory note as set out in the complaint of plaintiff herein." A mere statement of the facts makes it obvious that the complaint and the reply on the one hand and the answer on the other refer to the same note and that the note referred to is the instrument received in evidence.

2. Assuming that the note became due on August 9, 1915, and not before that date, then in order to make Effie May Terrill liable as an indorser, Belle Nickell, the holder, was obliged to present the note for payment on August 9, 1915, for Section 5904, L. O. L., provides that:

"Where the instrument is not payable on demand, presentment must be made on the day it falls due": 8 C. J. 533, 534, 548, 549.

3, 4. The plaintiff insists that she offered sufficient evidence to warrant a finding that the note was, on August 9, 1915, in the hands of the bank for delivery

to the maker upon payment being made by him. Effie May Terrill strenuously contends that there is an utter want of evidence to show that the note was in the hands of the bank for collection and that the most that can be claimed for the evidence is that the instrument was in the bank in the plaintiff's lock-box. It is true that Charles Nickell stated that the note had been "in mine and my wife's possession since it was received from Charles E. Terrill." The quoted answer of the witness cannot in fairness be construed alone and by itself, but it must be interpreted in connection with the remainder of the testimony given by the witness and when so construed there was sufficient evidence, if believed by the jury, to sustain a finding that the bank had the note in its actual possession on the date when it became due with authority to receive payment and surrender the note to the maker. The substance of the testimony of Charles Nickell is that he left the note in the bank; that about ten days or two weeks before the note became due he wrote to Bradshaw telling him that the note was in the bank and "to go and pay it." The jury could have fairly and reasonably construed the words of Nickell to mean that the bank had actual possession of the note with authority to surrender it upon payment.

However, it is argued that even though it is held that the bank had possession of the note with authority to surrender it upon payment being made, nevertheless no presentment for payment was made. This argument is based upon the language of Section 5905, L. O. L., where it is said:

"Presentment for payment, to be sufficient, must be made * * to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made."

If Belle Nickell had retained actual possession of the note and if she had gone to the bank with it on August 9, 1915, for the purpose of presenting it, then, if Bradshaw was not present, she would have been obliged to have presented the note to some person at the bank for payment. But it must be remembered that the note was payable at the Farmers and Fruit-growers' Bank of Medford and there was evidence to show that the instrument was in the hands of the bank for collection; and consequently it would have been an idle, empty and vain ceremony if some person connected with the bank had presented the note for payment to some other person connected with the bank when the person making presentment had as much authority as an agent of the bank to pay the note as the person to whom presentment was made. The negotiable instruments law (Sections 5905 and 5920, L. O. L.) simply redeclares the rule, which generally prevailed prior to the adoption of the statute, that when a note is made payable at a bank, a sufficient presentment occurs if the instrument is actually in the bank at maturity, ready to be delivered by the bank to any person who is entitled to it upon payment: *De La Vergne v. Globe Printing Co.*, 27 Colo. App. 308 (148 Pac. 923, 924); *Stewart v. Soenksen*, 173 Ill. App. 1, 3; *Kewanee National Bank v. Ladd*, 175 Ill. App. 151, 155; *Norwood National Bank v. Piedmont Publishing Co.*, 106 S. C. 472, 478 (91 S. E. 866); *Doherty v. First National Bank of Louisville*, 170 Ky. 810, 813 (186 S. W. 937); Crawford's Ann. Neg. Inst. Law (1916 ed.), 150; Eaton & Gilbert on Com. Paper, 452, 549; 3 R. C. L. 1206. See also: *Nelson v. Grondahl*, 13 N. D. 363 (100 N. W. 1093); Eaton & Gilbert on Com. Paper, 449; *Havlin v. Continental National Bank*, 253 Mo. 292, 301 (161 S. W. 741); 8 C. J. 558.

Section 5905, L. O. L., declares that presentment "must be made by the holder, or by some person authorized to receive payment on his behalf"; and the defendant contends that even though it be assumed that the note was in the actual possession of the bank, yet there was no evidence that any officer of the bank had authority to receive payment. In addition to the testimony of Charles Nickell there is the circumstance of the signature of the defendant on the back of the note. Possession at the time and place of payment, when indorsed as this note was, is *prima facie* evidence of authority to receive payment: 8 C. J. 565; Selover on Neg. Inst. (2 ed.), 246.

5. It is contended that the note sued upon is a non-negotiable instrument. This contention proceeds upon the theory that the words "due if ranch is sold or mortgaged" made the time of payment so uncertain that it cannot be said that the note was payable "at a fixed or determinable future time." Section 6017, L. O. L., defines a negotiable promissory note as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." Speaking of instruments generally, Section 5834, L. O. L., declares that an instrument to be negotiable must, among other things, "be payable on demand, or at a fixed or determinable future time." The meaning of "fixed future time" is expressed in Section 5837, L. O. L., thus:

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or, (2) on or before a fixed or determinable future time specified therein; or, (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The three sections of our Code to which attention has been directed correspond with Sections 184, 1 and 4 of the uniform negotiable instruments law which has been adopted by all the states of the Union except Georgia and Texas: *Utah State Nat. Bank v. Smith* (Cal.), 179 Pac. 160, 161. The chief object of the uniform negotiable instruments law was, as its name implies, to accomplish uniformity, so that a citizen of one state could know the law of every state by acquiring a knowledge of the law of his own state. Although in some of the states slight differences in phraseology may occasionally be observed, or sometimes, but rarely, omissions may be noted, or a small number of material changes might be specified, yet for the most part not only the subject matter but also the phraseology and the sections of the original draft are exactly the same in the states which have adopted the uniform negotiable instruments law. In the main, the uniform negotiable instruments law is only a legislative declaration of the rules of the law-merchant; and, indeed, the concluding section of the statute provides that:

"In any case not provided for in this act the rules of the law merchant shall govern": Section 6025, L. O. L.

While most of the rules of the law-merchant were thoroughly established and were the same in all American jurisdictions, still the subject of negotiable instruments presented many phases upon which appellate courts differed; and generally, but not always, the uniform negotiable instruments law solved these differences by adopting whatever rule was supported by the weight of authority; and hence it is accurate to say

that the uniform negotiable instruments law for the most part redeclares all the uniformly accepted rules of the law-merchant and, in most instances where there was a difference of judicial opinion, adopts whatever rule was supported by the weight of authority: 8 C. J. 47. Legislation has succeeded in establishing a substantially uniform code of rules governing negotiable instruments. Uniformity in legislation upon the subject of negotiable instruments may be said to be an accomplished fact, but perfect and exact uniformity in the construction and application of all those same rules is only an iridescent dream. Courts sometimes differ now, just as they sometimes differed before the adoption of the Uniform Negotiable Instruments Act, in the application of a given rule governing negotiable instruments although the rule itself may be accepted and agreed upon by all. An examination of reported decisions dealing with instruments analogous to the one presented here and rendered after as well as before the adoption of the uniform negotiable instruments law affords concrete illustration of the variant views sometimes expressed in the application of a given rule.

The provisions of the negotiable instruments law (Sections 6017, 5834 and 5837, L. O. L.) are only declaratory of the law-merchant as it existed in most jurisdictions; and, hence judicial opinions expressed before the enactment of the statute are not without weight in the solution of the problem confronting us: *Rossville State Bank v. Heslet*, 84 Kan. 315 (113 Pac. 1052, 33 L. R. A. (N. S.) 738); 3 R. C. L. 907; 8 C. J. 135; *Eaton & Gilbert on Com. Paper*, 213. If the words "due if ranch is sold or mortgaged" are omitted from the instrument it concededly becomes a negotiable promissory note within the meaning of Section 6017, L. O. L., because it contains a promise to pay "five years from date," which

is, speaking as of the date of the note, a fixed future time. If, on the other hand, the words "five years from date" are erased, the paper is admittedly transformed into a non-negotiable instrument, because it then becomes payable "if ranch is sold or mortgaged," which, if standing alone and viewed by itself, was at the time of the execution of the instrument a "contingency" within the meaning of Section 5837, L. O. L. We are not permitted, however, to cancel any word found in the instrument, and hence the whole of the paper must be considered in determining whether the instrument is or is not negotiable; *Finley v. Smith*, 165 Ky. 445 (177 S. W. 262, L. R. A. 1915F, 777, 780). It will be observed that the writing does not in express terms say that the debt becomes due if the ranch is sold or mortgaged *before* "five years from date" and yet such is the obvious intent and meaning of the whole writing. The debt becomes due at all events "five years from date," and the debt cannot extend beyond that fixed, certain and definite period, because the moment the five-year period ends the debt is due, and any other interpretation of the writing would completely nullify the words "five years from date"; but if the ranch is sold or mortgaged prior to the expiration of that fixed future time, then the promiser agrees to pay the debt at the time of such sale or mortgage: *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356). The words "due if ranch is sold or mortgaged" do not extend the date of payment, but upon the contrary they serve only to accelerate the maturity of the debt. Stated broadly, the overwhelming weight of authority is to the effect that where a note is made payable on a definite day and also contains a conditional promise to pay at an earlier time, the instrument is not rendered non-negotiable by the acceleration clause; *Kiskadden v. Allen*, 7 Colo. 206

(3 Pac. 221); *Walker v. Woolen*, 54 Ind. 164 (23 Am. Rep. 639); *Charlton v. Reed*, 61 Iowa, 166 (16 N. W. 64, 47 Am. Rep. 808); *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356); *Ernst v. Steckman*, 74 Pa. St. 13 (15 Am. Rep. 542); *Joergenson v. Joergenson*, 28 Wash. 477 (68 Pac. 913, 92 Am. St. Rep. 888); *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268 (34 L. Ed. 349, 10 Sup. Ct. Rep. 99, see, also, Rose's U. S. Notes); *Smith v. Nelson Land & Cattle Co.*, 212 Fed. 56 (128 C. C. A. 512); *White v. Hatcher*, 135 Tenn. 609 (188 S. W. 61); *Bright v. Offield*, 81 Wash. 442 (143 Pac. 159); *Utah State Nat. Bank v. Smith* (Cal.), 179 Pac. 160; *First Nat. Bank v. Barrett*, 52 Mont. 359 (157 Pac. 951); *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 569 (23 N. E. 417, 19 Am. St. Rep. 51, 7 L. R. A. 537); 3 R. C. L. 908; Selover on Neg. Inst. (2 ed.), 70; Eaton & Gilbert on Com. Paper, 220. See, also, *Page v. Ford*, 65 Or. 450, 469 (131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247). The books contain a variety of cases involving acceleration clauses. More common illustrations are found in instruments which provide that a default in the payment of interest or in the payment of an installment shall mature the debt. Other familiar examples are furnished by adjudications where a series of notes have been given for a single debt with a provision in each note that default in the payment of any one shall mature all the unpaid notes. While nearly all the courts have decided that a default in the payment of interest or in the payment of an installment or a failure to pay one of a series of notes is such an acceleration clause as does not destroy the negotiability of an instrument, yet there are recorded instances where courts have held that acceleration clauses of the kind mentioned impair the negotiability of instruments otherwise negotiable. As already

stated, the general principle has been firmly established, in despite of occasional dissenting voices, that an acceleration clause does not necessarily destroy the negotiability of an instrument. The chief difficulty, however, is encountered whenever an attempt is made to formulate a rule by which to determine the validity of all acceleration provisions; and it is probably impossible to formulate, even in the most general language, any rule which will include all acceleration provisions that have been held sufficient, and at the same time serve as a safe and certain guide in all jurisdictions. This difficulty is neither greater nor less now than it was previous to the adoption of the negotiable instruments law. For example, there is a class of cases dealing with instruments having provisions to the effect that if at any time the holder of the note deems himself insecure, he may declare the debt due; or to the effect that the holder may, if he deems himself insecure, call upon the maker for additional security when the value of the security given at the time of the execution of the writing becomes impaired, and if the maker fails to respond with additional security, the holder may declare the debt due. The adjudications assignable to this class are divided in their views; but the majority of the cases decided under the provisions of the negotiable instruments law as well as the majority of those decided in jurisdictions where the negotiable instruments law had not yet been adopted, have ruled that this kind of a condition in an acceleration clause renders the instrument non-negotiable; *Reynolds v. Vint*, 73 Or. 528 (144 Pac. 526); *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174, 178 (161 Pac. 384); *Holliday State Bank v. Hoffman*, 85 Kan. 71 (116 Pac. 239, Ann. Cas. 1912D, 1, 35 L. R. A. (N. S.) 390); *Puget Sound State Bank v.*

Washington Paving Co., 94 Wash. 504 (162 Pac. 870); *First Nat. Bank v. Bynum*, 84 N. C. 24 (37 Am. Rep. 604); *Carroll County Savings Bank v. Strother*, 28 S. C. 504 (6 S. E. 313); *Kimpton v. Studebaker Bros. Co.*, 14 Idaho, 552 (94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126); *Bright v. Offield*, 81 Wash. 442 (143 Pac. 159); *First Nat. Bank v. Russell*, 124 Tenn. 618 (139 S. W. 734, Ann. Cas. 1913A, 203). *Contra*: *Empire Nat. Bank v. High Grade Oil Refining Co.*, 260 Pa. 255 (103 Atl. 602); *Finley v. Smith*, 165 Ky. 445 (177 S. W. 262, L. R. A. 1915F, 777); *Kennedy v. Broderick*, 132 C. C. A. 381 (216 Fed. 137, L. R. A. 1915B, 472). The cases holding that an instrument is not negotiable if it contains a clause giving the holder the right to declare the debt due if he deems himself insecure are based primarily upon the objection that the date of maturity is placed wholly under the control of the holder, is completely dependent upon his whim or caprice, and is independent of any act done or omitted by the maker; and if there is the further stipulation that the maker will furnish added security when called upon, then there is of course an affirmative promise of the maker to do an act in addition to his promise to pay money: *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504 (162 Pac. 870, 874); *Holliday State Bank v. Hoffman*, 85 Kan. 71 (116 Pac. 239, Ann. Cas. 1912D, 1, 35 L. R. A. (N. S.) 390); *White v. Hatcher*, 135 Tenn. 609, 612 (188 S. W. 61).

It is apparent from what has already been said that some jurisdictions go further than others in their approval of acceleration clauses; and consequently a rule containing language as broad as the rule in some jurisdictions would be too broad for others, and a formula which is only broad enough for the latter would not be broad enough for the former.

In this jurisdiction the holding in *Reynolds v. Vint*, 73 Or. 528 (144 Pac. 526), and in *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174 (161 Pac. 384), condemns acceleration clauses which are entirely under the control of the holder and completely dependent upon his whim or caprice independent of any act of the maker; but since neither of those decisions condemns all acceleration clauses, we have no hesitancy in declaring that we prefer to keep company with the majority of the other jurisdictions by giving approval to certain kinds of acceleration clauses. What we deem to be the better rule is best expressed by language found in *Ernst v. Steckman*, 74 Pa. St. 13 (15 Am. Rep. 542), where a note, payable "Twelve months after date (or before, if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine)," was held to be negotiable. In concluding the opinion the court there said:

"The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

The principle which was expressed in *Ernst v. Steckman* was subsequently reiterated and applied by the supreme court of the United States in the leading and oft-cited case of *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268 (34 L. Ed. 349, 10 Sup. Ct. Rep. 999, see, also, Rose's U. S. Notes). Further exemplification of this principle may be found in the fol-

lowing precedents where the facts in some instances were exactly like and in all instances were analogous to the facts presented here: *Kiskadden v. Allen*, 7 Colo. 206 (3 Pac. 221); *Elliott v. Beech*, 3 Manitoba, 213; *Walker v. Woolen*, 54 Ind. 164 (23 Am. Rep. 639); *Charlton v. Reed*, 61 Iowa, 166 (16 N. W. 64, 47 Am. Rep. 808); *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356); *Joergenson v. Joergenson*, 28 Wash. 477 (68 Pac. 913, 92 Am. St. Rep. 888). The ruling in *Reynolds v. Vint*, 73 Or. 528 (144 Pac. 526), is not inconsistent with the adoption of the principle stated in *Ernst v. Steckman*, 74 Pa. St. 13 (15 Am. Rep. 542); *White v. Hatcher*, 135 Tenn. 609, 612 (188 S. W. 61); *First Nat. Bank v. Russell*, 124 Tenn. 618 (139 S. W. 734, Ann. Cas. 1913A, 203); *Bright v. Offield*, 81 Wash. 442 (143 Pac. 159, 161); *Joergenson v. Joergenson*, 28 Wash. 477, 481 (68 Pac. 913, 92 Am. St. Rep. 888); *Holliday State Bank v. Hoffman*, 85 Kan. 71 (116 Pac. 239, Ann. Cas. 1912D, 1, 35 L. R. A. (N. S.) 390, 395); *Clark v. Skeen*, 61 Kan. 526 (60 Pac. 327, 78 Am. St. Rep. 337, 49 L. R. A. 190). The note signed by Bradshaw conforms with the requirements of Section 5837, L. O. L., and is a negotiable promissory note; *Utah State Nat. Bank v. Smith* (Cal.), 179 Pac. 160; *Bright v. Offield*, 81 Wash. 442 (143 Pac. 159).

6. The respondent has argued that the debt represented by the note automatically became due when the conveyance was made to Frederick T. Lewis on January 18, 1913; but the answer is that the thoroughly established and indeed almost universal, if not the universal, rule is that the acceleration clause is not self-executing, but it merely confers an option upon the holder to treat the debt as due: *Belloc v. Davis*, 38 Cal. 243, 251; *White v. Hatcher*, 135 Tenn. 609, 616 (188 S. W. 61); *Clark v. Skeen*, 61 Kan. 526 (60 Pac.

327, 78 Am. St. Rep. 337, 49 L. R. A. 190); *First Nat. Bank v. Parker*, 28 Wash. 234, 237 (68 Pac. 756, 92 Am. St. Rep. 828); *Keene Five Cent Savings Bank v. Reid*, 123 Fed. 221 (59 C. C. A. 225); *Gillette v. Hodge*, 170 Fed. 313, 314 (95 C. C. A. 205); *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268, 284 (34 L. Ed. 349, 10 Sup. Ct. Rep. 999, see, also, Rose's U. S. Notes).

7. There is no evidence indicating or even intimating that the plaintiff exercised or attempted to exercise the option which the note conferred upon the holder to declare the note due in the event of a sale or mortgage of the ranch. Inasmuch as the plaintiff is relying upon the "general" date of maturity specified in the instrument and since the acceleration clause was not self-executing, it was unnecessary for the plaintiff to affirm a negative by pleading or proving it: *Dobbins v. Oberman*, 17 Neb. 163, 165 (22 N. W. 356); *Walker v. Woolen*, 54 Ind. 164, 165 (23 Am. Rep. 639).

8. One of the further and separate defenses interposed by Effie May Terrill is based upon the allegation that the note was delivered to and accepted by the appellant upon an agreement "to look entirely to" Bradshaw for payment without any claim upon the respondent "for liability for any portion of said note." Through cross-examination of witnesses for the appellant the respondent succeeded in introducing parol evidence in support of the defense last mentioned. The direct examination justified the cross-examination which was conducted by the respondent and permitted by the court (*Speer v. Smith*, 83 Or. 571, 575 (163 Pac. 979); and consequently the only remaining question arising out of the cross-examination is whether this testimony was competent for any purpose. The appellant insists that the testimony

was incompetent because it varied the terms of a written contract. The respondent relies upon an ingenious argument. The respondent endeavors to apply a principle discussed in *Colvin v. Goff*, 82 Or. 314 (161 Pac. 568, L. R. A. 1917C, 300). The argument of the respondent is, in substance, that the note on its face contained two contracts: One between the maker and the payee, and the other between the indorser and indorsee; that while there was a manual transfer of the paper for the purpose of effecting a delivery of the contract between the maker and payee, nevertheless the seeming contract between the indorser and indorsee "was never delivered except in the sense of a physical delivery"; and that therefore the respondent is "not seeking to vary the terms of a written contract, to wit: the contract of the indorser, but to show that this written contract was never delivered."

There is a divergence of judicial opinion as to whether or not the implications and intendments which the law attaches to a blank indorsement of negotiable commercial paper make such blank indorsement the equivalent of a complete written contract which cannot be varied by parol evidence: 8 Cyc. 264; 3 R. C. L. 974; 8 C. J. 1033; Crawford's Ann. Neg. Inst. Law (Rev. Uniform ed.), 133. In this jurisdiction, however, it has been the settled rule for nearly forty years that parol evidence cannot be received to vary or contradict the contract which the law writes over a blank indorsement when made after the delivery of a promissory note to the payee: *Smith v. Caro*, 9 Or. 278; *Carroll v. Nodine*, 41 Or. 412, 415 (69 Pac. 51, 93 Am. St. Rep. 743); *Smith v. Bayer*, 46 Or. 143, 147 (79 Pac. 497, 114 Am. St. Rep. 858). To this general rule there are certain exceptions which are specified in *Dale*

v. *Gear*, 38 Conn. 15 (9 Am. Rep. 353). See also: *Smith v. Caro*, 9 Or. 278, 287; *Moll v. Roth Company*, 77 Or. 593, 599 (152 Pac. 235); *Jones v. Albee*, 70 Ill. 34. The rule relied upon by the respondent is not available to her. The facts which she herself admits effectively prevent her from shielding herself with that rule. The manual transfer of the note was in no sense executory, but upon the contrary it was a completed and wholly executed act. There was no stipulation preventing the manual transfer from becoming a completed delivery with all the attending rights and obligations. When placed in the hands of the appellant the note bore the blank indorsement of the respondent. It is conceded by the respondent that she intended to transfer her ownership in the note. The transfer of ownership was not made contingent upon the happening of some event. The transfer was a finality. The contract of transfer, whatever the contract may have been, was executed and completed. The appellant says that the terms of the contract are to be found in the signature written on the back of the note; while the respondent argues that when the ownership of the note was transferred to the appellant the latter accepted the instrument upon an agreement different from that which the law writes into the blank indorsement of the respondent. In the last analysis the contention of the respondent is only an effort to vary and contradict the written contract of indorsement; and, hence, the parol testimony relating to any oral contemporaneous agreement was incompetent. The respondent has not brought herself within either of the first three exceptions noted in *Dale v. Gear*, 38 Conn. 15 (9 Am. Rep. 353, 355); and if there was an equity bringing the respondent in the fourth class of exceptions, "it must be set up as an equity provable

in equity, to bar an apparent legal liability." The defense urged by the respondent does not involve the question of waiver as did the case of *Moll v. Roth Company*, 77 Or. 593, 600 (152 Pac. 235).

9, 10. Both Brownsboro and Medford are in Jackson County. The letter which Charles Nickell wrote for the purpose of giving notice of dishonor was deposited in the postoffice at Medford and addressed to the respondent at Brownsboro, where she lived. The postmark on the envelope in which the letter was mailed indicates that it was postmarked at the Medford postoffice at 3:30 P. M. on August 10, 1915. Charles Nickell testified that he deposited the letter in the Medford postoffice but he did not state the time of the deposit further than to explain that he deposited the letter on the date shown by the envelope. The respondent was called as a witness for the plaintiff and stated that she received the letter, but she did not remember the date of its receipt. There is not a word of evidence showing the distance between Medford and Brownsboro. There is not a syllable of testimony telling about the mail service between the two postoffices. The record is utterly barren of any evidence showing whether there were one or more mails or any mail leaving Medford for Brownsboro on August 10th, or if there was any mail for Brownsboro on that day, whether it was before or after 3:30 P. M. The most that we can say from the record is that the letter was deposited at some time in the Medford postoffice on August 10th and postmarked at 3:30 P. M. and that afterwards the respondent received the letter in due course of mail. For aught that we can ascertain from the record there was a mail leaving Medford for Brownsboro at noon on August 10th; and if there was a mail leaving at that

hour and no other mail leaving on that day, then, in the absence of some excuse sanctioned by the law, the notice of dishonor was not mailed in time. The statute which governs this phase of the controversy provides that:

“Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: (1) if sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; * * ”: Section 5937, L. O. L.

The negotiable instruments law prescribes a definite time for mailing notice of dishonor. If there was only one mail on August 10th and if that mail left at a convenient hour prior to 3:30 P. M., the notice mailed by the appellant was too late. If there was no outgoing mail at all for Brownsboro on that day, then, of course, the letter was deposited in time. The liability of an indorser of a negotiable promissory note is contingent and, among other things, the liability is conditioned upon giving notice of dishonor within the time specified by the statute. The burden is upon the holder to prove that the notice was mailed within the time prescribed by law; it is not enough merely to show that the notice was deposited in the postoffice on the day following the day of dishonor, but it must also be shown that the notice was deposited “in time to go by mail the day following the day of dishonor,” if there was a mail at a convenient hour on that day. Strict proof is required. There is an utter want of evidence concerning out-going mails and consequently the judgment of involuntary nonsuit was properly rendered: *United States v. Barker*, 24 Fed. Cas. No. 14,519; *First Nat. Bank v. Miller*, 139 Wis. 126 (120

N. W. 821, 131 Am. St. Rep. 1040); *Downs v. Planters' Bank*, 1 Smedes & M. (Miss.) 261 (40 Am. Dec. 92); *Marks v. Boone*, 24 Fla. 177 (4 South. 532); *Richardson v. Kulp*, 81 N. J. L. 123 (78 Atl. 1062); *Commonwealth Bank v. Strong*, 28 Vt. 316 (67 Am. Dec. 714); *Corbin v. Planters' Nat. Bank*, 87 Va. 661 (13 S. E. 98, 24 Am. St. Rep. 673); 8 C. J. 655, 1016, 1055; Eaton & Gilbert on Com. Paper, 507.

The judgment is affirmed.

AFFIRMED.

McBRIDE, G. J., and BENSON and BURNETT, JJ., concur.

Argued on behalf of appellant at Pendleton October 29, affirmed December 16, 1919, rehearing denied January 13, 1920.

WAKEFIELD v. WAKEFIELD.

(185 Pac. 921.)

Divorce—Decree Where Both Parties are at Fault.

1. In divorce action where both parties were equally at fault, neither is entitled to equitable relief.

From Lake: L. F. CONN, Judge.

In Banc.

This is a suit for a divorce. The complaint charges the defendant with acts of cruelty and infidelity.

The defendant, in his answer, denies the allegations of the complaint and in an affirmative answer also charges the plaintiff with cruelty and infidelity.

The reply put in issue the averments of the answer. A large amount of testimony was taken consisting of over five hundred typewritten pages. The Circuit Court found and decreed that both defendant and

plaintiff were equally at fault, and that neither is entitled to any relief in a court of equity. Defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. O. M. Corkins*.

No appearance for respondent.

BEAN, J.—1. It appears from the record that the plaintiff and defendant intermarried on April 10, 1903, and that there are two children, the issue of such marriage, namely, Daisy Wakefield, a daughter of the age of fourteen years, and Orin Wakefield, a son eleven years of age. At the time of their marriage plaintiff and defendant each had a small number of livestock consisting of horses and cattle. They resided at different places in Lake County and accumulated about \$12,000 in property. The parties have continually for the past few years had serious marital difficulties. The whole record which is extremely nauseating and clearly shows wrong upon the part of both husband and wife is a shock to decency. We concur in the findings of the trial court that neither of the parties is entitled to equitable relief. A court of equity should not serve as a mere handmaid to regulate or promote the lustful desires and objects of the parties to a divorce suit. We are impelled to refrain from adding any more words than absolutely necessary to this record of matrimonial sadness, infidelity and wrong. A rehearsal of testimony would not benefit the parties or their children or anyone else. It is regrettable to say that it is a matter of judicial record and can be examined should necessity require.

The court allowed the plaintiff the sum of \$487, as suit money and defendant *inter alia* assigns this as error. From an examination of the record, taking into consideration the time consumed in the trial of the suit, the number of witnesses appearing on behalf of plaintiff and the financial condition of plaintiff and defendant, we think the amount allowed was reasonable and just.

The decree of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

Argued on demurrer to alternative writ September 19, 1919; demurrer overruled January 13, 1920.

**STATE EX REL. v. HINES, DIRECTOR-GENERAL OF THE
UNITED STATES RAILROAD ADMINISTRATION.**

(186 Pac. 420.)

Constitutional Law—Constitutionality of Statute may be Determined by Mandamus.

1. The constitutionality of an act may be tested in an original *mandamus* proceeding.

Commerce—Inspection—Legislature can Require Inspection of Hides as Condition for Shipment by Common Carrier.

2. To detect and prevent stealing of livestock, the legislature may enact a law for the inspection of hides as a condition of their shipment within or without the state by a common carrier.

Inspection—Exception in Statute Requiring Inspection of Hides for Shipment Destroys Effect in Sparsely Settled Country—"Farmer"—"Ranch."

3. A "farmer" is one who resides on and cultivates a farm, mainly deriving his support therefrom, and a "ranch" is a tract used for grazing and rearing livestock; so that, assuming that "farmer" and "ranch owner" have a specific legal meaning as used in Laws of 1919, page 732, Section 3, excluding farmers, ranch owners, and small isolated dealers from the requirement of inspection of hides as a condition to their shipment by common carrier, then the protection from theft intended by such statute is denied to the sparsely settled and isolated sections of the state.

Constitutional Law—Statute Providing for Its Taking Effect upon Request of Stock Raisers' Association Invalid as Delegation of Power.

4. Laws of 1919, page 732, Section 3, making it unlawful to transport hides by common carrier without inspection and suspending the operation of the law in Multnomah County so long as a state brand and livestock inspector appointed by the Governor under Laws of 1915, page 43, Section 16, providing for such appointment upon request of the Cattle and Horse Raisers' Association, is maintained therein, is unconstitutional as a delegation of legislative power to such association, in view of Article IV, Section I, of the Constitution, prohibiting delegation of legislative authority and Article I, Section 21, prohibiting laws taking effect upon any authority except as provided by the Constitution.

Original proceedings in *mandamus* in Supreme Court.

In Banc.

This is an original proceeding for a writ of *mandamus*, in which the relator alleges that it is a corporation organized and existing under the laws of the State of California, duly licensed to transact business in Oregon and engaged in buying and selling hides; that its principal office and main warehouse in Oregon is in the City of Portland; that at all the times alleged the defendant has been and is now director-general of the United States Railroad Administration, operating the lines of the Oregon-Wash. R. & N. Company east of Portland and those of the Southern Pacific Company north of Ashland; that such lines are engaged in business as common carriers of freight and passengers; that the Oregon-Wash. R. & N. Company connects by rail the cities of Portland and Pendleton, and the Southern Pacific lines north of Ashland connect the cities of Portland and Eugene, Oregon; that in carrying on its business the relator buys and sells many thousands of dollars' worth of hides annually and employs agents who are constantly traveling throughout the state, engaged in purchasing and ship-

ping them to the relator by rail from various points in the state to the City of Portland.

The petition states that on September 3, 1919, L. C. Penroid, who was then and is now one of the relator's agents, took four bundles of green salted calf-skins, weighing 232 pounds, to the freight office of the Oregon-Wash. R. & N. Company at Pendleton and tendered them to F. F. O'Brien, who was then and is now the agent of said company at that place, for the purpose of shipping such hides to Bissinger & Company at Portland, Oregon. It is claimed on behalf of the relator that the hides were properly packed and wrapped for shipment, and the relator had complied with all the regulations of the defendant covering shipments of this character; and that the relator's agent requested O'Brien as agent of the defendant to receive the said hides and transmit them by freight over the Oregon-Wash. R. & N. lines to Portland, and tendered the proper charges therefor. It is then charged that O'Brien, acting under the instructions of the defendant and in direct violation of his duty as agent of a common carrier, refused to accept the hides for shipment, on the ground that he had not been furnished with a certificate from the stock inspector of Umatilla County, as purports to be required by a law passed by the legislative assembly of 1919: Laws of 1919, Chapter 404, page 732, being an act "to provide for the inspection of cattle hides and fixing the fees and providing for penalties for violation of same." Further allegations are to the effect that the defendant then refused and still refuses to accept said shipment or to deliver the hides as requested and demanded by the agent of the relator.

Like charges are made concerning a tendered shipment of about 300 pounds of hides by Charles E.

Hursh, one of the relator's agents, from Eugene, Oregon, to Portland, and of the refusal and continued objection of A. J. Gillett, freight agent of the Southern Pacific Company at Eugene, to accept the hides for delivery to the relator in Portland.

The act in question is here set out:

"Section 1. Every dealer in or commercial seller of hides desiring to ship or otherwise transport the same within or without this state, shall, before doing so, furnish to the stock inspector in the county in which the same are to be loaded, a certificate describing fully the hides to be shipped by him by giving the number, brands and flesh marks on each of said hides, the name and address of the owner, of the shipper and of the consignee and also certify that he is either the owner or entitled to the lawful possession of said hides. If the certificate and other evidence furnished the inspector satisfies said inspector that such person is the owner or entitled to the lawful possession of said hides, he shall record the data furnished him in said certificate in a book to be furnished for that purpose by the county commissioner of each county and shall furnish a certificate in duplicate to the common carrier requested to ship said hides, one copy of which shall be kept on file by said common carrier, in its office at the place of shipment, which certificate must at all times during business hours be accessible to the public, and the other shall be attached to the bill of lading and delivered to any duly authorized stock inspector demanding the same, at the point of destination. If said stock inspector in the county from which said hides are desired to be shipped shall not be satisfied that the person desiring to ship said hides is the owner or in lawful possession thereof he shall not issue the certificate aforesaid, nor permit said hides to be shipped.

"Section 2. Said inspectors shall be paid for their services by the owner or person in charge of said hides the sum of 10 cents per hide on the first twenty-five hides or less number included in any lot so in-

spected and the sum of 3 cents per hide for all over and above twenty-five hides in such lot, and in addition thereto the said inspector shall be paid by the owner or person in charge of said hides the sum of 10 cents per mile one way for the distance he must travel in order to make such inspection.

"Section 3. It shall be unlawful for any common carrier to transport any hides out of this state, or to any other county within the state, without complying with section 1 of this act, and any common carrier who violates the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than \$100 nor more than \$1,000 and shall be responsible for damages to any person injured in treble the damages, costs and attorney fees; provided, that this act is not to be deemed to apply to farmers or ranch owners who slaughter their own animals, or to small, isolated dealers who purchase and ship hides to central dealers; provided further, that Multnomah County, Oregon, is to be exempt from the terms of this act so long as a state brand and livestock inspector is maintained at the Union stockyards, North Portland, Oregon."

The petition sets out that Multnomah County is exempt from the provisions of the act "so long as a state brand and livestock inspector is maintained at the Union stockyards, North Portland, Oregon"; that such brand and livestock inspector has been maintained at said Union stockyards during all the times mentioned; that the legislative enactment is in conflict with the requirements of the Constitution of Oregon and is void and of no effect; and that the "relator has no plain, speedy or adequate remedy at law in the premises," wherefore it prays for a writ of *mandamus* directed to the defendant, requiring him and his agents to receive and ship the said hides from both Pendleton and Eugene, Oregon. An alternative

writ was issued, to which a demurrer was filed, on the ground that it did not state facts sufficient to entitle the relator to relief; and that is the only question presented.

DEMURRER OVERRULED.

For relator there was a brief over the names of *Mr. Hall S. Lusk* and *Messrs. Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Lusk*.

For defendant there was a brief over the names of *Mr. John F. Reilly* and *Mr. Arthur C. Spencer*, with an oral argument by *Mr. Reilly*.

There was a brief and an oral argument by *Mr. George M. Brown*, Attorney General, *Amicus Curiae*.

JOHNS, J.—1. Much of the original relator's brief is devoted to the question of whether or not the constitutionality of the act can be tested in a *mandamus* proceeding. That matter is not controverted by the defendant, and the weight of authority sustains the relator.

2. The case of *New Mexico ex rel. E. J. McLean & Co. v. Denver & Rio Grande R. R. Co.*, was first decided by the Supreme Court of New Mexico, 12 N. M. 425 (78 Pac. 74, 79 Pac. 295), and later affirmed by the United States Supreme Court, 203 U. S. 38 (51 L. Ed. 78, 27 Sup. Ct. Rep. 1, see, also, *Rose's U. S. Notes*). In 1884 the territory of New Mexico enacted a law providing that all butchers should keep a record of all animals slaughtered and should keep the hides and horns free for inspection for thirty days. This law was later amended to provide that any inspector employed by the sanitary board should have the right at any time to enter any slaughter-house or other place where cattle were killed, to examine the same,

and the books and records required to be kept therein, and to compare the hides found with such records. In 1901 Section 3 was added to the original act, reading thus:

"Hereafter it shall be unlawful for any person, firm or corporation to offer, or any railroad company or other common carrier to receive, for the purpose of * * transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate."

It was vigorously contended that the whole law, this section in particular, was unconstitutional, but such claim was overruled by both decisions, the Supreme Court of the United States saying:

"The purpose of these provisions is apparent, and it is to prevent the criminal or fraudulent appropriation of cattle by requiring the inspection of hides and registration by a record which preserves the name of the shipper and purchaser of the hides, as well as the brands thereon, and by which is afforded some evidence, at least, tending to identify the ownership of the cattle. It is evident that the provision as to the shipment of the hides beyond the limits of the Territory is essential to this purpose, for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery. * *

"We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of prop-

erty. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the Territory are interested, seems to us an obviously rightful exercise of this power."

3. There is no legal question about the right of the legislature to enact a law for the inspection of hides as one condition of their shipment by a common carrier. It will be found upon an examination of the New Mexico law that there are no exceptions or reservations in the original act or any amendment thereto. It must be remembered that Section 3 of the act of 1919 provides, "that this act is not to be deemed to apply to farmers or ranch owners who slaughter their own animals, or to small, isolated dealers who purchase and ship hides to central dealers." 3 Words & Phrases, page 2699, defines the word "farmer" as "one who resides on a farm with his family, cultivating such farm and mainly deriving his support from it." Webster defines the word "ranch" as "a tract of land used for grazing and the rearing of horses, cattle or sheep." Assuming that the words "farmer" and "ranch owner" have a certain, specific legal meaning, how can a common carrier determine whether or not the consignor of hides is a farmer or ranch owner who has slaughtered his own animals, or that he is a small or isolated dealer, or that the consignee is a central dealer? Yet under the provisions of the act all of such individuals have a right to have hides shipped without inspection. As stated, the purpose of the law is to detect and prevent the stealing of livestock. It is a matter almost within the judicial knowledge of this court that from the very nature of

things the stock "rustler" largely conducts his nefarious operations in sparsely settled country and isolated sections, where hides from stolen stock would have their origin of shipment. But such portions of the state are denied the benefits of the protection intended to be provided by the act.

4. To arrive at the true meaning of the exemptions embraced in Section 3 of the act of 1919 above quoted, reference must be made to Section 16 of Chapter 33, Laws of 1915, reading thus:

"The governor shall at any time after the passage and approval of this act, upon request of the Cattle & Horse Raisers' Association of Oregon, appoint a stock inspector or inspectors for any stock yard or yards in the state of Oregon, the compensation of such stock inspector or inspectors to be agreed upon and paid by said Cattle & Horse Raisers' Association of Oregon. * * "

It will be noted that by Section 3 of Chapter 404, Laws of 1919, "Multnomah County, Oregon, is to be exempt from the terms of this act so long as a state brand and livestock inspector is maintained at the Union stockyards, North Portland, Oregon." That is to say, a stock inspector for Multnomah County is to be appointed by the Governor, at the request of the Cattle & Horse Raisers' Association and on condition that the association pay for his services. Hence, it must follow that if the association does not make the request, or declines to pay for the services of the inspector, Multnomah County would not have an inspector and would not be exempt from the requirements of the act. When these two sections are construed together, it is a matter entirely in the discretion of the Cattle & Horse Raisers' Association as to whether or not Multnomah County shall be exempt

from the provisions of the act of 1919. It is contended that this is a delegation of the legislative power and for that reason is unconstitutional. Section 1 of Article IV of the Constitution says:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives. * * "

And Article I, Section 21, reads thus:

"No *ex post facto* law or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution. * * "

These latter sections have been construed by this court in the case of *Portland v. Coffey*, 67 Or. 507 (135 Pac. 358), where it was held:

"If a statute is complete within itself when it comes from a legislative assembly, it is a general law and effective throughout the entire state, though its operation in particular localities may be made to depend upon a majority vote of the qualified electors thereof: *Elliott, Elements Mun. Corp.*, Section 60.

"The principle thus announced is well recognized in this state, where it has been held that a general statute, complete in itself, requiring nothing else to give it validity, could be made applicable to a particular section by a vote of the qualified electors: *Fouts v. Hood River*, 46 Or. 492 (81 Pac. 370, 7 Ann. Cas. 1160, 1 L. R. A. (N. S.) 483). The application of the act under consideration is not made to be appropriated to any particular district upon any vote of the people, who are regarded as the source from which legislative authority emanates, but the validity of the enactment is to depend upon a decision of the Supreme Court. This is, in effect combining independent departments of the state government which the organic law declares shall be kept separate: Article III, Section 1, of the Constitution of Oregon."

The same doctrine is sustained in *Slinger v. Henne-man*, 38 Wis. 504, and *Mitchell v. State*, 134 Ala. 392 (32 South. 689). Therein lies the distinction between the instant case and the authorities cited by the defendant.

In its present form, Chapter 404, Laws of 1919, is a delegation of the legislative power to the Cattle & Horse Raisers' Association of Oregon. We hold that the act as it now stands is unconstitutional and void.

The demurrer is overruled and the writ is sustained.

DEMURRER OVERRULED.

BEAN, J., was not present at the hearing.

BENNETT, J., does not express any opinion.

Argued December 3, 1919, affirmed January 13, 1920.

CRUMBLEY v. CRUMBLEY.

(186 Pac. 423.)

Appeal and Error—Abandoned on Failure to File Transcript or Abstract Within Required Time.

1. On appeal by plaintiff, where it is stated in defendant's brief that he has appealed, but where there is no copy of notice of appeal, or undertaking on appeal, or abstract in his favor, court will conclude that defendant abandoned appeal by failure to file transcript or abstract in appellate court within 30 days after perfection of appeal, under Laws of 1913, Chapter 320.

Divorce—Nonappealing Party cannot Attack Decree.

2. In divorce action, where plaintiff has appealed from a portion of the decree, defendant, upon failure to appeal, will be deemed to be satisfied with the decree as it stands, and cannot attack decree, but may defend it against plaintiff's attack.

Divorce—Appeal may be Taken from Portion of the Decree Affecting Property Rights.

3. Under Laws of 1913, Chapter 319, plaintiff in divorce action may appeal from that part of the decree relating to property rights without appealing from the whole thereof.

Divorce—Entire Record to be Considered on Appeal from Portion Relating to Property Rights.

4. On appeal by plaintiff in divorce action from that part of decree relating to property rights, her right to additional relief must depend upon equitable considerations to be derived from a perusal of the whole record, as upon a hearing *de novo*, and the decree will not be changed if, upon examination of the testimony as a whole, it appears that she did not come into court with clean hands, and was not entitled to any decree in her favor.

Divorce—Incompatibility of Temper not Ground.

5. Incompatibility of temper does not constitute a ground for divorce under Section 507, L. O. L.

Divorce—Portion of Decree Granting Divorce not Renewed on Appeal from Portion Affecting Property Rights.

6. On appeal from that portion of divorce decree relating to property rights, where neither party has appealed from the portion of the decree granting the divorce, the portion of the decree granting the divorce must remain intact, appellate court on such appeal having no power to overturn it.

Divorce—Prevailing Party not Entitled to Interest in Land of Adverse Party Unless Faultless.

7. The right of the party who has been granted a divorce to an undivided one-third part in real estate of adverse party, under Section 511, L. O. L., exists only where such prevailing party is not at fault.

Divorce—No Change of Decree on Appeal in Favor of Party Who has not Appealed.

8. On plaintiff's appeal from that portion of the divorce decree affecting property rights, where defendant has not appealed, the portion of the decree appealed from cannot be changed in defendant's favor.

Divorce—No Relief from Divorce Decree on Appeal Where Parties are in *Pari Delicto*.

9. On plaintiff's appeal from portion of the divorce decree affecting the property rights, no relief will be granted where, trying the case anew upon a transcript and evidence accompanying it, as required by Section 556, L. O. L., court on appeal concludes that the parties are in *pari delicto*.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

Suit by Mary C. Crumbley against J. S. Crumbley.
From a portion of the decree rendered, plaintiff appeals.
AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. A. S. Dresser* and *Mr. H. A. Webster*.

For respondent there was a brief with oral arguments by *Mr. B. F. Mulkey* and *Mr. Wilson T. Hume*.

BURNETT, J.—This is a divorce case. The parties were married January 7, 1891. They have three sons well above the age of majority and a fourth son said to be fourteen years old. Two daughters, one twelve and the other eight years of age, complete the family. The plaintiff accuses the defendant of cruel and inhuman treatment rendering her life burdensome. The specifications range from the application to her of opprobrious epithets impugning her chastity, through uncouth table manners, to his burning the late periodicals. A conspicuous feature of the complaint is a long list of the defendant's real property coupled with the plaintiff's demand for one third of it and for liberal alimony. The answer flatly denies all allegations of the complaint which impute misconduct to the defendant. Some minor questions are raised about the quantity of his interest in some tracts of the realty mentioned, but they are not important. The defendant makes counter-charges of cruelty such as the plaintiff's calling him a scurrilous name indicating that his ancestry was of canine origin, and that she expressed her contempt of him because of his occupations of fisherman, logger and lumberman and berated him with sundry vituperative epithets not necessary here to relate.

In substance, the answer charges also that the parties did not agree on the subject of the family birth rate; that, although both of them are healthy and vigorous, she practiced the doctrines of Malthus, while he desired to be fruitful, to multiply and replenish the

earth, according to their capabilities, with the result that the practice of the function by which the race is perpetuated was permitted by her only under exacting and repulsive conditions. The result of the hearing was a decree awarding the plaintiff a divorce, the custody of the minor children together with a money allowance of ten dollars per month for the support of each of them until the age of eighteen years is reached, as well as two hundred dollars as attorney's fees. As a disposition of the real property, the decree awarded to the plaintiff an undivided eighth interest in what is known as Horseshoe Island in Multnomah County, Oregon, an eighty-acre tract in Wahkiakum County, Washington, and Lot 10 in Block 1 of East Portland Heights in the City of Portland, Oregon. It also adjudged "that the defendant is the owner in his own individual right in fee" of sundry tracts of land described in detail in the decree.

The plaintiff appealed only from that part of the decree declaring the defendant to be the owner in severalty of the parcels of land therein described. Although it is stated in the defendant's brief that he appealed from the whole decree, there is no evidence in the record before us to support that assertion.

1. There is an utter absence of any copy of notice of appeal or undertaking on appeal, or abstract, in his behalf. From this we are bound to conclude that if he ever appealed, he afterwards abandoned it by failing to file his transcript or abstract in this court within thirty days after perfection of his appeal: Laws 1913, Chapter 320.

2. Not having appealed, the defendant is deemed to be satisfied with the decree as it stands and he is in no position to attack it.

3. On the other hand, the plaintiff's appeal from a specific part of it is sanctioned by Chapter 319 of Laws of 1913. That the party who has not appealed cannot obtain here a modification favorable to himself of the decree from which the other litigant has appealed is taught by *Shook v. Colohan*, 12 Or. 239 (6 Pac. 503); *Shirley v. Burch*, 16 Or. 83 (18 Pac. 351, 8 Am. St. Rep. 273); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Cooper v. Thomason*, 30 Or. 162 (45 Pac. 296); *Board of Regents v. Hutchinson*, 46 Or. 57 (78 Pac. 1028); *McCoy v. Crossfield*, 54 Or. 591 (104 Pac. 423); *Bank of Commerce v. Bertrum*, 55 Or. 349 (104 Pac. 963, 106 Pac. 444); *Flinn v. Vaughn*, 55 Or. 372 (106 Pac. 642); *Caro v. Wollenberg*, 83 Or. 311 (163 Pac. 94).

Imputing satisfaction with the decree to the defendant, however, does not prevent him from defending it against the attack of the plaintiff, but he cannot go beyond merely supporting it: *Landram v. Jordan*, 203 U. S. 56 (15 L. Ed. 88, 27 Sup. Ct. Rep. 17); *Southern Pine Lumber Co. v. Ward*, 208 U. S. 126 (52 L. Ed. 420, 28 Sup. Ct. Rep. 239, see, also, Rose's U. S. Notes); *O'Neill v. Wolcott Mining Co.*, 174 Fed. 527 (98 C. C. A. 309, 27 L. R. A. (N. S.) 200). In *Inman v. Henderson*, 29 Or. 116 (45 Pac. 300), the trial court had established certain materialmen's liens as against a property owner. Another feature of the litigation was the question of the validity of those very liens as against a mortgagee who had put them in issue by the traverse in his answer. The lienors, who alone appealed, contended that inasmuch as their demands had been sustained as against the property owner, through whom the mortgagee claimed, and the owner had not appealed, their liens could not be opposed in this court by the mortgagee who had not appealed. It was decided, however, that "the mortgagee, having de-

nied by its answer the validity of the mechanics' liens, may insist on this appeal that they are void as against it, for any sufficient reason appearing from the record, and that it was not compelled to appeal from the decree against Mrs. Henderson to raise that question." So in the instant case, the fact that the plaintiff has appealed from part of the decree and the defendant has not appealed does not operate to deliver him in chains as to the spoiler and to charge him as not resisting.

4. The plaintiff is here seeking further advantage over the defendant. Not content with what the trial court gave her, she wants more. Her right to additional relief must depend upon equitable considerations to be derived from a perusal of the whole record, for, as said in *Bush v. Mitchell*, 28 Or. 92, 96 (41 Pac. 155, 156), "an appeal from a part of a decree must necessarily bring to the appellate court the whole decree, and while the part appealed from may be affirmed, modified, or reversed, the portion not reviewed will be affirmed. The whole cause being tried here *de novo*, a complete decree must be rendered in this court." The clear deduction from the foregoing citations is that on an appeal from a part of a decree, the whole record may be considered to determine whether that portion of the decree ought to have been rendered; that the quest of the appellate court is controlled so that the part not appealed from must stand as a constant quantity in making up the final result; that the party who did not appeal cannot obtain from this court a decree more favorable to him than that rendered by the trial court; that he may resist any change in the decree, using for that purpose anything disclosed by the record of the whole case, and that the appellant, having come into this court seeking additional relief, must submit herself to equitable principles as upon a hearing *de novo*, so far as the part of the decree appealed from

is affected. It follows that if an examination of the testimony in the record discloses that she did not come into court with clean hands and so on the merits was really not entitled to any decree in her favor, this court, on her appeal, will not make any change in the original decree to her advantage.

A detailed analysis of the testimony would encumber the official reports with a batch of disgusting stuff that would not establish any new principle of law and would only serve to gratify morbid curiosity. It is sufficient to say that the testimony for the plaintiff shows the frequency of mutual quarrels between herself and her husband. Her application to him of opprobrious epithets is abundantly established. Throughout her testimony and that of her sons who were witnesses for her, runs a vein of carping combativeness that is an earmark of a quarrelsome disposition. Aside from the direct testimony, it is easy to discern between the lines that the plaintiff was no mean antagonist in their domestic brawls.

5. It may be that a fair case of incompatibility of temper has been made out, but this does not constitute a ground for divorce under our statute: Section 507, L. O. L.

The following language of Mr. Justice MOORE in *Beckley v. Beckley*, 23 Or. 226 (31 Pac. 470), is peculiarly applicable to the case in hand:

“To entitle one to a decree of divorce for cruel and inhuman treatment, the injured party must come into a court of equity free from the suspicion that he has contributed to the injury of which he complains. Divorces should not be granted by weighing the evidence and decreeing in favor of the one least guilty, where both have taken an active part in the mutual discord. Equity relieves the injured party but not the vanquished. In the struggles for supremacy, or to vent

spleen, spite or hatred, the willing actors may fight out the battles of wedded life, but they cannot invoke the aid of equity after their own efforts have failed."

See, also, *Taylor v. Taylor*, 11 Or. 303 (8 Pac. 354); *Adams v. Adams*, 12 Or. 176 (6 Pac. 677); *Wheeler v. Wheeler*, 18 Or. 261 (24 Pac. 900); *Mendelson v. Mendelson*, 37 Or. 163 (61 Pac. 645); *Crim v. Crim*, 66 Or. 258 (134 Pac. 13); *Matlock v. Matlock*, 72 Or. 330 (143 Pac. 1010).

A study of the testimony convinces us that neither party comes into the chancery side of the court fortified by that rectitude of conduct towards the other which alone will justify the interposition of equity. If the hearing *de novo* in this court included the whole case, it ought to result in the denial of relief to both parties.

6. The obstacle preventing that result is the fact that neither party has appealed from the portion of the decree granting the divorce. That part must remain intact. We have no authority to overturn it.

7. As to the property, all the defendant can accomplish here is to maintain the status established by the decree, because he did not appeal. The conduct of the plaintiff as disclosed by the testimony disqualified her from obtaining even so much relief as she did. She must be satisfied with the award of the Circuit Court. That result follows because the defendant is not in position on the record to deprive her of it. It is true, as declared in Section 511, L. O. L., that "whenever a marriage shall be declared void or dissolved the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree." Although this is an inevitable accompaniment of a proper divorce, yet, like the decree of which it is a part,

it depends upon the principle that the party claiming it must come faultless into chancery. If this necessary foundation for equitable relief is wanting, the appellate court, so far as it has jurisdiction, will demolish the superstructure. But in this instance, as the property question is the only feature presented by the plaintiff's partial appeal, our decree can reach only that.

8. We cannot disturb it for the defendant, because he has not appealed.

9. We ought not to increase the allowance of real property for the plaintiff, because on the merits she is not entitled to what she has. Coming into a court of conscience, she must on the facts disclosed by the entire testimony appear worthy of the additional relief she seeks at our hands. It is not enough for her merely to point to an erroneous conclusion of law drawn by the trial court whereby the property involved was partitioned between the parties instead of being awarded to them as tenants in common, to her an undivided one third and the remainder to the defendant. Thus would the equitable essence of the case be supplanted by a dry technicality. The defendant is entitled to support the decree as it is by anything to be found in the record, whether of fact or of law.

Finally, trying the case "anew upon the transcript and evidence accompanying it," as required by Section 556, L. O. L., so far as we may on an appeal from part of the decree, we are compelled to the conclusion that the parties are *in pari delicto*. Consequently, we must leave them where we found them, giving to neither any additional advantage over the other.

The decree of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON, J., concur.

HARRIS, J., concurs in the result.

Argued November 13, 1919, affirmed January 13, rehearing denied February 10, 1920.

CROW v. ABRAHAM.

(186 Pac. 426.)

Judgment — Attorney Estopped by Judgment Against Client as to Land in Which Attorney had Interest.

1. Where, with a view of bringing suit to quiet title to land, one claiming ownership deeded a one-third interest to his attorney as a contingent fee and the attorney as such brought suit in which his client asked for a decree that he was owner of all the land, and a decree was rendered against his client and in favor of the defendant, in a subsequent action by the defendant for the value of the use and occupation of the same, the attorney cannot set up his deed as a defense, as the legal effect would be to litigate the identical question passed on in a prior suit.

From Douglas: GEORGE F. SKIPWORTH, Judge.

Department 2.

On February 26, 1883, H. G. Crow executed a warranty deed to E. J. Crow for about one thousand acres of land in Douglas County, Oregon, which is the real subject matter of this litigation.

Thereafter the firm of Marks & Company, as creditors of H. G. Crow, brought suit in the Circuit Court of that county to set aside this conveyance upon the ground that it was a fraud upon them as creditors of H. G. Crow.

This terminated in a final decree, rendered by this court in *Marks & Co. v. Crow et al.*, 14 Or. 382 (13 Pac. 55), in which the deed was set aside for that reason and the property was subjected to a sale upon the claim of Marks & Company, and was thereafter sold to E. J. Crow to whom a sheriff's deed was duly executed, September 8, 1887, and in whom the legal title has been vested ever since.

Claiming, notwithstanding such sale and sheriff's deed, that E. J. Crow continued to hold the legal title

to the property in trust for the use and benefit of him, H. G. Crow entered into negotiations with the defendant, Albert Abraham, an attorney, with a view of bringing a suit against E. J. Crow for a decree that he held the legal title to the property in trust for H. G. Crow and for an accounting of the rents and profits.

As a result, on September 23, 1906, H. G. Crow executed to the defendant, Albert Abraham, his certain deed, combined with a power of attorney, to an undivided one third of his interest in the lands in question, and concurrent therewith, on the same date and as a part thereof, H. G. Crow and Albert Abraham entered into another written agreement, from which it appears:

"That whereas the said party of the second part desires to commence suit against one E. J. Crow for an accounting and to compel a reconveyance and quieting of title as to certain lands mentioned in a certain trust deed and power of attorney executed by and between the parties hereto of even date herewith, and the said party of the second part is without means to secure witnesses and provide for the expenses of the said suit and for said purpose and for the purpose of paying attorney fees has transferred in trust to the said party of the first part an undivided one-third ($\frac{1}{3}$) interest in the said property described therein to be dealt with as the said Albert Abraham shall see fit and to retain to the said Albert Abraham as he may see fit to disburse the proceeds therefrom for the said expenses of said suit and attorneys fees, and as to the said power of attorney for the convenience of the said parties to make any transfer which it may be advantageous to the said parties should the party of the second part herein desire to sell his remaining two-thirds ($\frac{2}{3}$) interest in said property;

"Now therefore it is agreed and understood by and between the parties hereto that the said Albert Abraham is employed as attorney for the said party of the second part to commence and prosecute the said suit and to recover the said lands from the said E. J. Crow

and to enforce an accounting from him the said E. J. Crow as aforesaid whether the same may be done by suit or without suit and to use his best endeavors to that end and to settle and compromise any and all matters between the said H. G. Crow and E. J. Crow as in the best judgment of the said Albert Abraham shall see fit and proper; and to sell, employ or retain the said one-third interest in said property above described and the proceeds arising therefrom to pay for his services and the expenses of the said suit. And it is further agreed and understood that in addition to the said interest in said land so conveyed in trust the said Albert Abraham shall have and retain one-third of any moneys recovered in said accounting recovered by suit or otherwise."

"And it is agreed that the said Albert Abraham shall use his best endeavors and employ his best skill and talents as such attorney in said matter and hereby accepts the said employment on said terms and agrees to prosecute the same to final determination.

"And it is agreed and understood that the said H. G. Crow shall remain in possession and enjoy the rents and profits from all of the said lands until the 1st day of October 1910.

"It is agreed and understood by and between the parties hereto that the said party of the first part shall not sell the two-thirds of the said property which belongs to the said party of the second part unless he shall first have the consent of the said party of the second part, but shall only act as the agent of the said party of the second part under express authority which is agreeable to the said party of the second part."

After the execution of and pursuant to those written instruments, H. G. Crow commenced a suit against E. J. Crow to have him declared trustee of the title for H. G. Crow and for an accounting, in which Mr. Abraham appeared as one of his attorneys.

That suit resulted in a decree in the lower court in favor of the plaintiff, as prayed for in his complaint,

from which an appeal was taken to this court and the lower court was reversed, in an exhaustive opinion written by Mr. Justice RAMSEY, *Crow v. Crow*, 70 Or. 534 (139 Pac. 854), on March 24, 1914, and a rehearing was denied on June 2, 1914, in which it was held and decreed that the defendant, E. J. Crow, or his successors were the owners of the property in dispute and that the plaintiff, H. G. Crow, did not own any of the property in dispute and was not entitled to an accounting.

The instant action was commenced by the plaintiff, E. J. Crow, to recover from the defendants for the value of the use and occupation of the lands which were in controversy in the suit and which have been in possession of the defendants since the decree was rendered.

After a trial in the lower court judgment was rendered in favor of the plaintiff against the defendant Abraham, as trustee, for \$566.67, the rental value for an undivided two-thirds interest in the land, and against him personally for \$283.33, the rental value of an undivided one-third interest. On appeal to this court the judgment against Abraham, as executor, was affirmed, and the judgment against him personally for \$283.33 was reversed upon the ground that "an error was committed in excluding the defense of adverse possession to an undivided one third of the real property, interposed by the defendant on his own behalf," and the case was remanded to the lower court for a retrial as to the defendant Abraham personally, concerning the rental for the one-third interest which he personally claimed in the land.

At the retrial there was an agreement as to the amount of the rental value of the interest which he

claimed and after the testimony was all taken and on motion of the plaintiff the court directed the jury to return a verdict against the defendant, Abraham personally, for that amount and upon which judgment was entered, and from which he appeals, assigning numerous errors in the admission and rejection of evidence and the sustaining of the motion. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. Albert Abraham, Mr. J. O. Watson and Mr. Carl E. Wimberly*, with an oral argument by *Mr. Abraham*.

For respondent there was a brief and an oral argument by *Mr. Oliver P. Coshow*.

JOHNS, J.—To defeat the action against him the defendant, Abraham, claims title to an undivided one-half interest in the real property under his deed which was executed September 23, 1908, concurrent with the written instrument, above quoted, which was prior to the suit of *H. G. Crow v. E. J. Crow*, from which it appears that Mr. Abraham was employed to prosecute that suit and that for his services he should receive an undivided one-third interest in the lands.

With that as a basis he entered into another agreement with other parties, whose names are not disclosed by the record, by which they were to furnish the necessary moneys for costs and expenses, in consideration of which they were to receive one half of Abraham's one third or an undivided one sixth. It was nothing more nor less than an agreed contingent fee. There was no actual money paid. Abraham, as attorney for the plaintiff, had personal knowledge of all the surrounding facts and circumstances and was not an inno-

cent purchaser for value. Taking and accepting his deed under these conditions, he could only acquire an undivided one-third interest in the title of H. G. Crow as it then existed, in H. G. Crow, and if Crow did not own the lands Abraham would not acquire any title by his deed. In the suit which H. G. Crow brought, in which Mr. Abraham was one of his attorneys, it was finally decreed that E. J. Crow was the owner of the lands and that H. G. Crow did not have any interest therein and was not entitled to an accounting. Under the facts disclosed in the record Mr. Abraham could not take or acquire any better, other, or different title than his grantor had at the time of its execution.

Again, while it is true that H. G. Crow did remain in possession of the lands after the final decree in the suit was rendered, no testimony was produced or offered which shows or tends to show that such possession was adverse or hostile to E. J. Crow who held the record title.

The facts are peculiar. When the deed from H. G. Crow to Abraham is construed with the concurrent written agreement between them and the collateral facts, the whole transaction is an agreement for a contingent fee which Abraham was to receive in the event that H. G. Crow won his lawsuit against E. J. Crow and H. G. Crow lost his case and the court rendered a decree that E. J. Crow was the owner of the lands. Growing out of the fact that H. G. Crow remained in actual possession of the lands after the decree was rendered and that he should pay for the value of the use and occupation of same, plaintiff commenced this instant case and now has a final judgment against the estate of H. G. Crow for two thirds of the rental value of the lands, and Abraham personally seeks to defeat

judgment against him for the other third for the reason that through his deed from H. G. Crow he then became and is now the owner of an undivided one-third interest in the lands.

However after that deed for the one-third interest was executed he brought suit, as attorney for H. G. Crow as plaintiff, against E. J. Crow to recover complete title to all of the land. In other words, having his own deed to the undivided one third of the land, Mr. Abraham brought a suit for his client, from whom he had obtained his title, in which his client asked for a decree that he was owner of all of the land and in which the title to all of the land was litigated and a decree was rendered against his client, H. G. Crow, and in favor of E. J. Crow. In legal effect the defendant, Abraham now seeks to litigate the identical question again as to his one-third interest.

If the agreement between H. G. Crow and Abraham were for a contingent fee in a personal injury case in which only a money judgment could be rendered and his client failed to obtain any judgment, it would then not be contended that his attorney would be entitled to have or receive the full or any amount of his contingent fee. In legal effect Mr. Abraham, by his defense is now claiming the full amount of his contingent fee evidenced by the deed from his client for an undivided one third in the land. He lost the case for his client which he took on a contingent fee and for which he received his deed; and the plaintiff now has a judgment against his client for the rental value of the two-thirds interest in the land which he claimed to own, and in the same action in which that judgment was rendered Mr. Abraham now seeks to defend, under the deed which he received from his client before the suit was brought to

recover the property for his client and which deed was executed for the purpose of bringing that identical suit.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued on demurrer to petition for alternative writ December 18, 1919, demurrer sustained January 13, 1920.

STATE EX REL. v. OLCOTT, SECRETARY OF STATE.

(187 Pac. 286.)

States—Automatic Succession to Governorship on Death During Term.

1. Under Article V, Section 8, of the Constitution, in case of death of the governor during his term of office, the secretary of state becomes governor to serve for the unexpired term of four years provided by Sections 1 and 7 and Section 8 providing a line of automatic succession from governor to secretary of state and to president of the senate, having been adopted to prevent a vacancy in the office of governor.

[As to the existence and effect of vacancy in office of governor, see note in ANN. CAS. 1915A, 577.]

Courts—Rule of *Stare Decisis* Applies With Peculiar Force to Decisions on Constitutional Questions.

2. The rule of *stare decisis* applies with peculiar force to the decision of courts on question of constitutional law, and a particular construction of a constitutional provision having been adopted, it will be recognized and enforced subsequently.

[As to limitations on the doctrine of *stare decisis*, see notes in 27 AM. DEC. 628; 73 AM. ST. REP. 98.]

Original proceeding in *mandamus*.

In Banc.

This is an original petition for a writ of *mandamus*, in which the relator alleges that he is a natural born citizen of the United States, over twenty-one years of age, has been district attorney and a resident of Jack-

son County for more than one year last past and is now a resident and legal voter therein for all state and county offices; that the defendant is the duly elected, qualified and acting secretary of state; that on November 5, 1918, James Withycombe was duly elected governor of the State of Oregon and duly qualified for that office on January 14, 1919; that the defendant was elected secretary of state on November 7, 1916, and duly qualified on December 26, 1916; that on March 3, 1919, James Withycombe, the duly elected and qualified governor, died; that the office of governor and the duties thereof then devolved upon the secretary of state; and that on March 7, 1919, the defendant took the oath of office and assumed the duties of governor. The relator contends that the defendant should hold the office only until the first Monday in January, 1921, and not for the unexpired term of the late Governor Withycombe; that under the laws and Constitution of the State of Oregon the office of governor will become vacant on the first Monday in January, 1921; that the said office should be filled at the general election to be held November 2, 1920, by the legal voters; that it is a duty especially enjoined upon the defendant to prepare and furnish to each county clerk a statement showing the several state offices for which candidates are to be chosen in the respective counties at the primary nominating election to be held May 21, 1920; and that the defendant has neglected and refused to perform the said duty in this, that he has failed to name in such statement the office of governor of the State of Oregon, for which nomination should be made at the coming primaries. The petitioner demands that the statements sent to the county clerks of the various counties of the state be corrected by naming therein

the office of governor of the State of Oregon, charging that the defendant has refused to make such correction. He prays for an alternative writ of *mandamus* directed to the defendant, compelling him to correct said statements and include therein the office of governor, or show cause why he should not do so. A certified copy of the notice sent to the county clerk of Jackson County with such omission is attached to and made a part of the petition.

The attorney general appeared for the defendant, filing a general demurrer alleging that the petition "does not state facts sufficient to constitute a cause of action." WRIT DENIED. DEMURRER SUSTAINED.

Mr. G. M. Roberts, in pro. per., for the petition.

Mr. George M. Brown, Attorney General, for the demurrer.

JOHNS, J.—1. In legal effect, the question now before us is the one which was sought to be presented in the case of *Olcott v. Hoff*, 92 Or. 462 (181 Pac. 466), but was not then decided, because some members of this court did not think the question was legally before it and for such reason no four members could then agree upon an opinion. The controversy now has to do with whether Mr. Olcott ceases to be governor when his term of office as secretary of state expires, or whether he shall continue to hold that office for the remainder of the unexpired term of the late Governor Withycombe. The vital question to be determined is: What was legally decided in the case of *Chadwick v. Earhart*, 11 Or. 389 (4 Pac. 1180), and how far is that decision binding upon this court?

It was the intention of the framers of the original Constitution that all of the administrative officers of the state should be elected for the period of four years and at the same election. Section 1 of Article V of the Constitution provides:

"The chief executive power of the state shall be vested in a governor, who shall hold his office for the term of four years; and no person shall be eligible to such office more than eight in any period of twelve years."

And Section 7 is as follows:

"The official term of the governor shall be four years; and shall commence at such times as may be prescribed by this Constitution, or prescribed by law."

Section 16 of that article says:

"When during a recess of the legislative assembly a vacancy shall happen in any office, the appointment to which is vested in the legislative assembly, or when at any time a vacancy shall have occurred in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

In our first Code, compiled by Hon. M. P. DEADY, Section 16 is annotated by him to read:

"Governor to fill vacancies by appointment."

That construction has been followed, and all appointments to state offices have been made by the governor, who alone is vested with that authority; but there is no provision for the appointment of a governor and there has never been a vacancy in that office. To prevent that and to provide a line of succession, Section 8 of Article V of the Constitution was adopted, reading thus:

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

Although it is true, as Mr. Justice HARRIS has pointed out in his opinion in *Olcott v. Hoff*, that in annotating this section Judge DEADY used the words, "Acting governor in case of vacancy or disability," it is also true that in the later Code compiled by Deady and Lane the same section was annotated to read, "In case of vacancy or disability."

The decision in *Chadwick v. Earhart* was rendered by a unanimous court in October, 1884. Hill's Code was annotated and published in 1892, and in annotating Section 8 of Article V of the Constitution Mr. Hill said:

"Secretary as governor.—The secretary of state entering upon the duties of governor, upon the governor's resignation, may continue to perform the functions of governor for the remainder of the governor's term of office, though he cease in the meantime to be secretary of state: *Chadwick v. Earhart*, 11 Or. 389 (4 Pac. 1180)."

Bellinger & Cotton's Code was published in 1902 and the compilers then made the following annotation to the section mentioned, citing *Chadwick v. Earhart*:

"The secretary of state entering upon the duties of governor, upon the governor's resignation, may continue to perform the functions of governor for the remainder of the governor's term of office though he ceases in the meantime to be secretary of state."

Lord's Oregon Laws were published in 1910 and the following annotation therein is made to that section:

“Under this provision, when the governor resigns, the duties of the governor’s office devolve upon the secretary of state, who continues to perform them for the remainder of the term of the outgoing governor: *Chadwick v. Earhart*, 11 Or. 389 (4 Pac. 1180).”

Mr. Lord was one of the judges by whom the decision in *Chadwick v. Earhart* was rendered in 1884.

While we respect Judge DEADY for both his learning and ability, any construction which he may have placed upon Section 8 was given before the decision in the Chadwick case was rendered. It must be conceded that Judge Bellinger and W. W. Cotton were men of equal learning and ability, and their annotation was made after that case was decided. The same is true as to W. Lair Hill, who was recognized as one of the ablest lawyers in Oregon. The decision in the Chadwick case was rendered by a unanimous court then consisting of Chief Justice WALDO, E. B. WATSON and W. P. LORD, and it is significant that in compiling his own Code, under Section 8 of Article V, Mr. Lord made the annotation above quoted.

We have no record of the oral arguments, but as pointed out in our opinion in *Olcott v. Hoff*, two questions were raised in the respective briefs filed in the Chadwick case. Mr. Earhart, then secretary of state, contended first that Mr. Chadwick was not entitled to the salaries of both governor and secretary of state, after he had become governor by the resignation of that office by Mr. Grover, but to that of secretary of state only; and second, that he was not entitled to the salary of the governor’s office after he ceased to be secretary of state. Mr. Chadwick claimed that he was entitled to the salaries of both offices during the time he was secretary of state and governor, and to the salary of governor for the two days that he held that

office after he ceased to be secretary of state. Both of Mr. Chadwick's contentions were sustained by the unanimous decision of the court. On the second point, the right to the salary of governor after he ceased to be secretary of state, the court held:

"This question * * must also be answered in favor of the appellant and judgment be entered accordingly."

By reason of that decision Mr. Chadwick was paid the salary for the two days that he held the office of governor after ceasing to be secretary of state. The cause of action was for a lump sum of money which included both claims and for the reasons stated in the opinion each of his claims was allowed. The conclusion is inevitable that the second claim could be allowed only upon the theory that Mr. Chadwick continued to be governor in fact after he ceased to be secretary of state.

It is significant that since the rendition of that opinion, without an exception the annotators of the Code, W. Lair Hill, C. B. Bellinger, W. W. Cotton and W. P. Lord, all men of the highest type in their profession, have construed the decision to mean that now, under the existing facts, Mr. Olcott should hold the office of governor for the remainder of the late Governor Withycombe's unexpired term. Such annotations will be found under Section 8 of Article V of the Constitution in every Code compiled and published since the rendition of that decision, which for thirty-five years has never been questioned.

Three different efforts have been made to change Section 8 of Article V of the organic law of the state: The first on November 5, 1912; the second on November 3, 1914, and the last at the special election of June 3, 1919. On the last occasion a committee composed of

Gus C. Moser, state senator, and Chris Schubel and William G. Hare, representatives, presented an argument in the voters' pamphlet in favor of the proposed amendment, saying:

"The duties of the office of governor will continue to be performed by Governor Olcott for the remainder of the term of office for which the late Governor Withycombe was elected."

To this might be added that Arizona, Utah and Wyoming are the only states in the Union which have a Constitution providing that in the event of the governor's death the secretary of state succeeds to his office or performs the duties thereof. Yet every attempt to change that section of the Constitution has been defeated by the vote of the people.

It is vigorously contended that the people should have an opportunity of choosing their own governor. They have had and exercised that right under the terms and provisions of the Constitution which three times they have refused to amend. Section 8 expressly provides that "in case of the removal of the governor from office, or of his death, * * the same shall devolve upon the secretary of state." Every voter who cast his ballot for Mr. Olcott for the office of secretary of state legally knew that under the terms of the Constitution, upon the death of Governor Withycombe, Mr. Olcott would become governor. Further, there is no provision in either statutes or Constitution for an election to fill an unexpired term of the office of governor. Such a proceeding would have to be read into the Constitution, would be based upon implied construction only, and would overrule the precedent of *Chadwick v. Earhart*.

Should the attorney general, for example, die, there would then be a vacancy in that office which could be

filled by appointment by the governor, under Section 16 of Article V of the Constitution. But when the governor dies, his office, under Section 8 of the same article, "shall devolve upon the secretary of state." That is to say, this section provides a line of succession to the office of governor; and upon the death of the incumbent the secretary of state automatically becomes governor. Upon the death of the secretary of state while in the office of governor the president of the senate becomes acting governor. There is a marked distinction between the meaning, force and effect of Section 16 and Section 8 of Article V. Under Section 16 a vacancy occurs, which the governor may fill by appointment. While the line of succession remains unbroken, as we construe Section 8, there is no such occurrence as a vacancy in the office of governor; and Sections 1 and 7 of Article V expressly provide that the term of the governor shall be four years. There is no provision by which anyone is authorized to appoint a governor. Section 8 provides a line of automatic succession; it was adopted to prevent a vacancy in the office of governor. Therein lies the distinction between the instant controversy and the cases of *State ex rel. v. Johns*, 3 Or. 533, and *State ex rel. v. Ware*, 13 Or. 380 (10 Pac. 885).

Under our Constitution the governor is the chief executive officer of the state, in whom only the power of appointment is vested, and in the very nature of things a vacancy in that office would destroy the whole plan of the state government. A governor was elected in November, 1918, and qualified in January, 1919, and one has been elected and qualified every four preceding years since the adoption of the Constitution. Under Sections 1 and 7 of Article V of the organic law the term for which a governor is elected is absolutely fixed

at four years and there is no provision in either the statutes or Constitution for the election of a governor for any portion of an unexpired term. Hence, under the terms of those sections, if a governor should be elected at the next general election, he would hold office not only for the remainder of the unexpired term of the late Governor Withycombe, but for a full four year period from January, 1921, to January, 1925. That would disarrange and destroy the whole plan of the framers of the Constitution.

2. The rule of *stare decisis* is well stated by Mr. Justice BURNETT in dissenting opinion in *Kalich v. Knapp*, 73 Or. 587 (145 Pac. 27, Ann. Cas. 1916E, 1051), thus:

"Another doctrine equally well settled is that of *stare decisis*, to the effect that, when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned, except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides"; citing authorities.

And it applies with peculiar force to the decisions of courts on questions of constitutional law. The same doctrine is announced in *In re City of Seattle*, 62 Wash. 218 (113 Pac. 762), where the Supreme Court of Washington said:

"The rule of *stare decisis* is peculiarly applicable to the construction of the Constitution. The interpretation of that document should not be made dependent upon every change in the personnel of the court. When one of its clauses has been construed, that construction should not be set aside except for the most cogent reasons. Certainty in the law is of the first importance."

In *Multnomah County v. Sliker*, 10 Or. 65, 66, Mr. Chief Justice LORD said:

"The matter here is the constitutionality of a statute, and the rule is said to be almost universal in construing statutes and the Constitution, to adhere to the doctrine of *stare decisis*."

In *State v. Frear*, 142 Wis. 320, 327 (125 N. W. 961, 964, 20 Ann. Cas. 633), the Supreme Court of that state said:

"Decisions on constitutional questions that have long been considered the settled law of the state should not be lightly set aside, although this court as presently constituted might reach a different conclusion if the proposition were an original one."

Black's Constitutional Law (3 ed.), page 81, subdivision 15, lays down the rule thus:

"The principle of *stare decisis* applies with special force to the construction of Constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons."

The authorities are uniform upon the force and effect of *stare decisis* in regard to a constitutional question.

In face of the decision in *Chadwick v. Earhart*, and with knowledge of such collateral facts, the people have always opposed any amendment to Section 8 of Article V of the Constitution. That decision was upon a constitutional question and under the facts it cannot be said that it is not sustained by reason and authority. Whatever may be our present opinions, it must now be held, under the principle of *stare decisis*, as binding upon this court. The writ is denied and the demurrer is sustained. WRIT DENIED. DEMURRER SUSTAINED.

BENNETT, J. (Specially Concurring.)—This case is fully stated in the opinion of Mr. Justice JOHNS, to which we refer.

The same questions herein presented were discussed at great length in *Olcott v. Hoff*, 92 Or. 462 (181 Pac. 466). These questions seem now squarely before us for decision. Every citizen is interested in who shall be governor of the state and in the enforcement of the law by which the election of a governor is submitted to the voters, at the time contemplated by the provisions of the Constitution of the state; and a *mandamus* proceeding may be maintained in a case like this at the relation of such a citizen. Otherwise, the rights of the voters could be ignored entirely, and the election of a governor postponed from time to time, at the will of the secretary of state, and there would be no remedy: *State v. Ware*, 13 Or. 380 (10 Pac. 885).

After much consideration and some hesitation I feel compelled to concur in the opinion of Mr. Justice JOHNS upon the ground of *stare decisis* only. It seems to me that the case of *Chadwick v. Earhart*, 11 Or. 389 (4 Pac. 1180), is directly in point and is controlling. If it were not for that case and if the question was here as a matter of first impression, I should be governed by the reasoning of Mr. Justice HARRIS, when the question was under consideration in *Olcott v. Hoff*, which seems to me to present, as a matter of logic, the stronger considerations.

The reasoning of the Chadwick case does not appeal to me as being, by any means, conclusive in its logic or even very cogent. The court in that case seems to have concluded that the relation of secretary of state to the office of governor was exactly the same as the relation of Vice-president to the office of President in the federal government. There does not seem to me

to be such analogy. The President of the United States is elected to a four year term. There is no provision in the Constitution or laws, by which in case of death or resignation his successor could be elected at any intervening time. It follows as a matter of course that the Vice-president shall take his place in case of death, and hold his office for the full remainder of the original term, because there are no means or provision by which a successor can be elected at any intervening time.

The case of governor and secretary of state under our Constitution is different. Here we have general elections every two years over the entire state, when the people may (if the Constitution is not construed to prohibit), elect a governor at the same time as the other general officers, and the members of the legislative assembly.

Neither does the reasoning of the court in that case, by which it was concluded that Section 8 of Article V of the Oregon Constitution, made the "office" of governor itself devolve upon the secretary of state and entitle the occupant of the secretary of state's office to take that office personally, and hold it after he ceases to be secretary of state, seem to me altogether satisfactory. It seems to me a better construction of the Constitution would have been, that the duties of the office, rather than the office itself, devolved upon the secretary of state, and that he exercised those duties only by virtue of his office and as long as his office of secretary of state continued. And that the office of governor itself became vacant upon the death or resignation of the governor, and could be filled at the next general election.

But we must accept some things as settled. Otherwise, there would be no end to controversy and litiga-

tion, and no one would know what his rights really are or who is entitled to administer the laws under which he lives. While not entirely satisfied with the reasoning, I find myself unable to accept the contention of the relator, that the opinion of the court in the Chadwick case was mere *dictum*; or to follow the reasoning of Mr. Justice HARRIS by which that case is distinguished from the case at bar.

It is plain there were two independent questions presented in the Chadwick case. First, whether the duties of the office of governor devolved upon the secretary of state and gave him the right to the salary of the office while he was such secretary; second, whether he continued to perform the duties of the office of governor after his office as secretary expired and during the term from which the outgoing governor had resigned; and was he therefore entitled to the salary of governor during the remainder of that term.

It is plain that what was said by the court in relation to the first question has no bearing upon this case.

If we strip the opinion down to what is strictly pertinent here it will be short and I think clear and will read as follows:

“Two questions are submitted in this case. The first and principal one is, whether, when, under Section 8 of Article V of the Constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office. Second. If this question be answered in the affirmative, whether he shall continue to perform the duties of the office *for the remainder of the term of the outgoing governor*, or shall he perform those duties only so long as he shall continue to be secretary of state. * *

“The principle on which the second question is to be decided, namely, whether the appellant shall cease to be governor when he ceases to be secretary of state, seems to be this: If an office be appendant, as the ex-

pression is in 1 Leon. 321, to another office, the determination of the first office will determine the second. * *

"On the contrary, if the nomination or appointment to an office be by *descriptio personarum* of one who holds some office by the title of which he is described, and who on some contingency is to enter and fill another office, the answering the description at the time the contingency arises designates him as the person who is to enter and fill the office, and when, as thus designated, he enters into the office, he holds it in his natural, and not in his official capacity. * *

"This question, therefore, must also be answered in favor of the appellant, and judgment be entered accordingly."

I have italicized such words in the foregoing as seem to me to be particularly pertinent. It seems clear to me that the court by this language, intended to pass in a broad way upon the whole question, and to hold that the office of governor, which had been resigned by Governor Grover, passed to Chadwick personally, and carried with it *all the attributes of that office*, including the right to hold it for the entire remainder of the term, which unquestionably belonged to the previous outgoing governor. If this view needs any further support than the mere language of the opinion itself already quoted, it is found in the fact that the court reached this conclusion on account of the analogy which it assumed to exist between the offices of governor of the State of Oregon and secretary of state on the one hand, and the office of President and Vice-president of the United States upon the other; and the court reasoned that the office of governor passed to the secretary of state *in the same way and for the same remainder of the term* that the office of President of the United States passes to the Vice-president. Part of the opinion reads:

"The Constitution of the United States, providing for the contingency of a vacancy in the office of President, is nearly the same with the provisions of our state Constitution providing for a vacancy in the office of governor. * * The Vice-president holds the office of President until the successor to the deceased President comes to assume the office *at the expiration of the term* for which the deceased President and the Vice-President were elected."

We may doubt whether the supposed analogy was as complete and perfect as the court assumed, and indeed as to whether there was any analogy at all, but we cannot very well doubt that the court in the Chadwick case intended to hold that the secretary of state, held the office of governor of Oregon, in the same way that the Vice-president holds the office of President of the United States upon the decease of the President. When we remember further that the court held that the "office" devolved upon the secretary of state, and when we consider that the term "office," when used thus without limitation, has reference to the duration of the position and the term of its occupancy, as well as the duties to be performed, the purpose of the court becomes still plainer.

In *People v. Ahearn*, 196 N. Y. 221 (89 N. E. 930, 26 L. R. A. (N. S.) 1153), it is said in relation to the word, "office":

"It means a right * * to hold the place and perform the duty *for the term* and by the tenure prescribed by law."

In *Kendall v. Raybould*, 13 Utah, 226 (44 Pac. 1034), it is said:

"An office embraces the idea of tenure, *duration*, emoluments, and duty, and these ideas or elements cannot be separated and each considered abstractly. All taken together constitute the office."

To the same effect, see *Tanner v. Edwards*, 31 Utah, 80 (86 Pac. 765, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091).

In *State v. Rose*, 74 Kan. 262 (86 Pac. 296, 10 Ann. Cas. 927, 6 L. R. A. (N. S.) 843), it is said:

“An ‘office’ is a trust conferred by public authority for a public purpose and for a definite term.”

In *United States v. McCrory*, 91 Fed. 295 (33 C. C. A. 515), the court defines the word “office” as follows:

“An office is a public station or employment conferred by the appointment of governor, the term embracing the idea of tenure, *duration*, employment and duties.”

To the same effect, see *Burrell’s Law Dictionary*, title “Office.”

In *United States v. Hartwell*, 6 Wall. 385 (18 L. Ed. 830), the Supreme Court of the United States says of the term “office”:

“The term embraces the idea of tenure, *duration*, emolument and duties.”

In *People v. Duane*, 121 N. Y. 375 (24 N. E. 847), it is said of a public office that it means, among other things, the right “to hold the place and perform the duty *for the term* and by the tenure prescribed by law.”

It seems plain to me that the court used the word in this sense in *Chadwick v. Earhart*, when it said in effect that the “office” of governor devolved upon the secretary of state for the remainder of the governor’s term, and that it intended to place its decision upon the broad principle, that the office of governor, with all its attributes, including the duration of the term, devolved upon the person who was then secretary of state, who continued to hold it for the entire remainder

of the term, the same as the Vice-president holds the office of President.

It remains to be considered, whether or not the question which the court did decide and which it intended to decide, in the case of *Chadwick v. Earhart*, and especially the question as to whether or not the secretary of state took the office personally and held the office of governor for the entire term, or only a portion thereof, was fairly within the issues made in that case, or whether, on the other hand, the principles that the court announced in that case were outside of the issues and mere *dictum*, which settled nothing and binds nobody.

In considering this question we must, it seems to me, remember that this is a great constitutional question in which the whole people of the state are deeply interested. They are interested to know, now and at all times hereafter, who is in truth their governor, and who is entitled to administer their laws. And when that question had once been settled they are interested in having that settlement remain undisturbed. It is far more important that the people shall know for a certainty who is of right their governor at a given time, and who is entitled to perform the duties of the highest office of the state, than it is that any one person shall be governor at a given period.

It is not so very important to the people of the State of Oregon, whether Mr. Olcott or some other competent person shall act as governor for the ensuing two years. But it is important—exceedingly important—that whoever does act as governor shall have undoubted and unquestioned authority—so that his acts may be valid and the people may know them to be valid, and that their validity is beyond doubt or cavil. We do not want any possibility of two governors in the

state; or two persons claiming to be governor, each with some shadow of authority and with a divided fealty behind him. It is because of such possibilities, no doubt, that the authorities recognize that the doctrine of *stare decisis* rests with peculiar and exceptional force, upon such great constitutional questions.

Mr. Black, in his work on Judicial Precedents, page 222, says:

"The principle of *stare decisis* applies with especial force to the construction of Constitutions, and an interpretation once deliberately put upon the provisions of such an instrument, should not be departed from without grave reasons."

And at another place, on page 223:

"Former decisions should not be departed from merely because the court, as at present constituted, entertains a different opinion as to the meaning or application of a given provision of the Constitution from that announced by its predecessors."

And again, on page 224:

"It is said that the principle of *stare decisis*, as applied to the construction and interpretation of the Constitution, is specially imperative, when the former decisions were rendered at an early day and have long been considered as settling the law."

In Lewis' Sutherland on Stat. Const. (2 ed.), Section 475, it is said:

"When a judicial interpretation has once been put upon a clause, expressed in a vague manner and difficult to be understood, that ought of itself to be sufficient authority for adopting the same construction."

It is true that questions not fairly within the issue made by the pleadings and presented to the court, cannot be authoritatively passed upon in any case, and if the court goes outside of these questions and decides

others which are not before it, its utterance is a mere *dictum* which binds no one; and we must always assume that the court only intended to pass upon the questions that were really presented in any case for decision. But I do not understand, that in order to make the decision in one case a controlling precedent in another, the two cases must be in all respects exactly identical. On the other hand, as I understand the rule, if the doctrines announced in one case are necessary to the decision—necessary to the conclusion which the court reached in that case, and a part of the reasoning upon which the court reached that conclusion, they become established principles which govern all other cases, which come within them.

“Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the courts ruling in relation thereto, can in no sense be regarded as mere *dictum*”: *Railroad Co. v. Price*, 159 Fed. 332 (86 C. C. A. 504, 16 L. B. A. (N. S.) 1103).

“No matter what the situation may appear to be, as to the unjust operation of a law, courts should not struggle to change it as it has been understood to exist and has been plainly written into its decisions for years, by fine distinctions between cases, and by rejecting the reasons upon which they were grounded as *obiter*”: Lewis’ Sutherland on Stat. Const. (2 ed.), § 484.

“A judicial decision is to be regarded as conclusive, not only of the point presented in argument, but of every other proposition necessarily involved in reaching the conclusion expressed”: *Id.*, § 486.

Our own court has gone further than most courts—further than it has seemed to me sometimes it ought to go—in extending the doctrine of *stare decisis*. In the case of *Wilcox v. Warren Construction Co.*, 95 Or. — (186 Pac. 13), decided at this term, the majority of the court held that a previous decision that a mother took

to the exclusion of a father under the employers' liability law, upon the death of a child, was controlling as to the relative right of the widow and children under the same law on the death of the husband and father, although the court in the previous decision had not even attempted to decide the rights of the latter in any way, and there was a very broad ground for distinguishing between the two.

In *Olcott v. Hoff*, already cited, the majority of the court held that an authoritative and controlling decision could be made, as to how long and for what term the secretary of state could hold the office of governor; and even as to whether he could resign the office of secretary of state and still hold the office of governor, although neither of these questions were at all presented in the pleadings, and the only question really at issue, was whether or not the state treasurer should have honored a warrant drawn for his salary, while he was still secretary of state, and while the office of governor was still unquestionably vacant except for his incumbency. In that case Mr. Justice HARRIS, in an opinion in which Mr. Justice BENSON concurs, says:

"We can with propriety discuss and *determine* the question as to how long Ben W. Olcott is entitled to hold the office of governor and thus decide the rights of the petitioner upon the one hand and the duties of the defendant on the other."

And that—

"The petitioner can resign as secretary of state and continue to occupy the office of governor."

If a decision, as between the rights of the mother and father to damages under the liability law, is to be held conclusive and controlling between the widow and children, whose rights were in no way in question, and if

we could properly determine the right of the secretary of state to resign and still hold the office of governor, and the right of the secretary of state to hold the office of governor after the election in 1920 in *Olcott v. Hoff*, when these questions were in no way presented by the pleadings, then it seems to me, that it would be going a long way to hold that we are not bound, by the unanimous decision of a previous Supreme Court, when it was passing properly and necessarily upon the very question as to whether such secretary of state, acting as governor, held for the full remainder of the governor's term or only a portion of that remainder.

It seems to me the holding of the court in the Chadwick case, that the office of governor devolved upon the secretary of state for the full term of the outgoing governor, carrying with it all the attributes of that office in the hands of him who had resigned, including the duration of the term, was necessary to that decision; and indeed was the very foundation upon which the decision was based. That being true, it follows that we must so hold in this case unless we are ready to overrule the Chadwick decision and disturb again what was once settled thereby, because our own individual judgments—or the individual judgment of the majority of us—differs from the judgment of the preceding tribunal. This I am not willing to do.

How can anything in relation to these great constitutional matters, be settled, if one court does not follow the precedent of another? How can we expect other courts in the future to follow our decisions if we ourselves refuse to follow the decisions of those who have gone before? If we overthrow the decision in the Chadwick case because some of us now believe that the Constitution should have been differently construed, there is nothing settled—nothing determined. The

next court coming after us will find two decisions of this court in direct conflict. One a unanimous decision by a full court, holding directly that the secretary of state holds for the entire term of the governor and our decision by a divided court to the contrary. Which decision would the succeeding court be bound to follow, or would it be bound to follow either. The whole question will be thrown into chaos and no one, under such conditions, would know who would be really governor. Since the Chadwick case was decided I think it has been universally accepted as settling the question.

As is shown in the opinion of Mr. Justice JOHNS, the different codifiers of our laws—all of them learned lawyers—since that time, have embodied in every codification a note to this section of the Constitution, announcing that the secretary under such conditions holds over during the entire term. No lawyer could open his Code to the Constitution without having it staring him in the face. It has stood thus for 35 years. The decision of the Chadwick case is a part of the early history of the state. Since that decision, young men have grown old. Children have been born and married and died. An entire generation has passed away. Since then seventeen legislatures have held their biennial sessions. They have not even submitted an amendment changing the Constitution as thus construed. For many years now the people have had the opportunity to change their own Constitution by the initiative. No change in this regard has been made or even offered.

May we not assume fairly, that the people and the legislature have been satisfied with the Constitution as it was considered in the Chadwick case? It is true that our system of filling our offices is generally by election rather than by appointment. But when the sec-

retary of state takes the office of governor he takes it in some sense by election. The people, when they elect a secretary of state, know that in case of the death or resignation of the governor, he will become the incumbent of that office. Since the decision in the Chadwick case, we must suppose that the people knew and accepted the fact that he would become governor for the entire remainder of the governor's term. When they elect a secretary of state they may fairly be presumed to have elected him for that purpose and with these things in view; and we may assume that he is their choice to fill that position in case of the death or resignation of the governor. Of course if there is no vacancy—if the office of governor is already filled, by an incumbent who has the right to hold the office for the entire term for which Governor Withycombe was elected—then there is no governor now to be elected, and the petition of the relator must be denied. I cannot see any escape from this result.

HARRIS, J. (Dissenting.)—The relator contends that the legal voters of Oregon have the right to elect a governor at the regular biennial election to be held in November, 1920; while it is argued, in behalf of the defendant, that Ben W. Olcott who is now occupying the office of governor is entitled to continue to perform the duties of governor until January, 1923. The question for decision has received the careful consideration of all the members of the court, but with the result, however, that all do not reach the same conclusion. A majority of the court are of the opinion that the legal voters of the state cannot choose a governor until the biennial election occurring in 1922 and that Ben W. Olcott can occupy the office of governor until January, 1923, notwithstanding the fact that his term as secre-

tary of state will expire on the first Monday in January, 1921, and in despite of the fact that a regular biennial election will be held throughout the state in November, 1920. I dissent from the conclusion reached by a majority of my associates; for I am of the opinion that under the Constitution of this state the people have a right to elect a governor at the next election. Although I expressed my views upon the subject at some length in *Olcott v. Hoff*, 92 Or. 462 (181 Pac. 466); yet I think that the arguments advanced in the instant proceeding warrant a re-statement of some of the facts narrated in *Olcott v. Hoff* and justify an amplification of some phases of the subject there considered.

It is argued that the question to be decided in this case was determined in the case of *Chadwick v. Earhart*, 11 Or. 389 (4 Pac. 1180), and that consequently the doctrine of *stare decisis* is applicable. The case of *Chadwick v. Earhart* occupies an important place in this controversy. Mr. Justice BENNETT expressly bases his conclusion upon *Chadwick v. Earhart* and says that, were it not for the Chadwick case, he would come to a different conclusion. An analysis of the opinion written by Mr. Justice JOHNS will show that the case of *Chadwick v. Earhart* is taken as the sole foundation and then upon it as such foundation is laid the whole argument for the conclusion finally reached. This is equivalent to saying that because, and only because, of what was decided in *Chadwick v. Earhart* it is now here decided that Ben W. Olcott is entitled to serve as governor until the expiration of the term for which James Withycombe was elected. If this is a correct statement then it is accurate also to say that a majority of the court would hold that a governor

could be elected in November, 1920, were it not for the decision rendered in the Chadwick case.

If the case of *Chadwick v. Earhart* had never been brought and if the questions necessarily decided in that case were now for the first time presented I would, for reasons which to me appear to be not only persuasive but also convincing, construe Article V, Section 8 of the Constitution differently in some respects from the interpretation expressed in *Chadwick v. Earhart*; but since *Chadwick v. Earhart* was prosecuted to a final decision in this court I think that under the rule of *stare decisis* this court ought to be bound by that decision to whatever extent, but no further than, it was necessary for the court to go in order to dispose of the controversy there presented.

We can all agree that the doctrine of *stare decisis* is a firmly established rule and that it is peculiarly applicable to controversies involving the construction of any given section of the state Constitution. But we cannot all agree that the doctrine of *stare decisis* applies here. That we may see, if possible, whether this doctrine is properly applicable to the case in hand let us ask: What is this rule of *stare decisis*? When can we say that the doctrine is applicable, And is this case which is now presented to us for decision properly governed by the rule? As the writer views the facts, the situation presented in *Chadwick v. Earhart* is essentially different from the situation presented here. As the writer reads the records, it was not necessary for the court to decide in *Chadwick v. Earhart* and the court did not decide that the secretary of state could hold the office of governor under the provisions of Article V, Section 8 of the Constitution through two regular biennial state elections. In the opinion of the writer an analysis of the facts in *Chadwick v. Earhart*,

when made and compared with the facts presented here, will show plainly that the two situations are essentially different and that the doctrine of *stare decisis* has no application whatever to the present controversy.

Expressed in plain English the doctrine of *stare decisis* means: To stand by precedents, and not to disturb settled points; a point once decided ought to stand as settled and should not be disturbed. In other words, stated in general terms, but subject to the limitations yet to be noticed, whatever points were necessary to be decided in *Chadwick v. Earhart* in order to reach the final conclusion there expressed should be considered as settled and ought not to be disturbed.

The rule of *stare decisis* is not a loose generality; but it is circumscribed and confined within well-established limits. In *Hough v. Porter*, 51 Or. 318, 410 (95 Pac. 732, 98 Pac. 1083, 1099), this court said:

"It is well settled that no case can be deemed a precedent binding upon the court unless the point in question was there presented or considered."

The following terse statement appears in *Johnson v. Bailey*, 17 Colo. 59 (28 Pac. 81):

"It is not every remark in a judicial opinion that amounts to a judicial decision."

See, also: *People ex rel. v. State Board of Tax Commissioners*, 174 N. Y. 417 (67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884, 898); *McAdams v. Bailey*, 169 Ind. 518 (82 N. E. 1057, 124 Am. St. Rep. 240, 13 L. R. A. (N. S.) 1003, 1009).

In *Cohens v. Virginia*, 6 Wheat. 264, 399 (5 L. Ed. 257), Chief Justice MARSHALL used the following language which has been repeatedly quoted with approval by text-writers and jurists:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Larzelere v. Starkweather*, 38 Mich. 96, 101, the court used the following *apropos* language:

"In the preparation of an opinion, the facts of the case are in mind. It is prepared with reference to such facts, and when considered in connection therewith, will generally be found satisfactory. When, however, an attempt is made to pick out particular parts or sentences, and apply them indiscriminately in other cases, nothing but confusion and disaster will be likely to follow. In other words, the opinion and decision of a court must be read and examined as a whole in the light of the facts upon which it was based. They are the foundation of the entire structure which cannot with safety be used without reference to them."

This principle was invoked by Mr. Justice BENNETT when dissenting from the majority opinion in the recent case of *Wilcox v. Warren Construction Co.*; for we quote from his dissenting opinion as follows:

"However, as the question of preference between the widow and the orphan children was not before the court in that case (referring to a prior adjudication) and there is much ground for distinction between the priority of the mother and father on the one hand and those of the widow and children upon the other, *we must according to recognized principles, assume that the*

court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question."

In the historic case of *Ogden v. Saunders*, 12 Wheat. 212, 332 (6 L. Ed. 606), it was contended that the opinion rendered in the prior case of *Sturges v. Crowninshield*, 4 Wheat. 122 (4 L. Ed. 529), was controlling; but this contention was answered by Chief Justice MARSHALL who in the course of his justly celebrated opinion wrote as follows:

"But that decision (*Sturges v. Crowninshield*) is not supposed to be a precedent for *Ogden v. Saunders*, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in *Sturges v. Crowninshield*, that the positive authority of a decision is coextensive only with the facts on which it is made."

Remembering that "it is not every remark in a judicial opinion that amounts to a judicial decision," that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used," that the opinion in a "former case must be construed with reference to the particular facts in that case," that "we must, according to recognized principles, assume that the court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question," and that "the positive authority of a decision is coextensive only with the facts on which it is made," and with these fundamental rules constantly in mind, let us now narrate the material facts presented in *Chadwick v. Earhart* and then let us state the facts presented in the instant controversy, and after so doing, let us then compare the two situations and as-

certain, if we can, whether the doctrine of *stare decisis* can be invoked by the defendant.

L. F. Grover was elected governor at the June, 1874, election for the full term of four years; and at the same time Stephen F. Chadwick was elected secretary of state for a like term. The Constitution has always provided that the returns of every election for governor shall be sealed up and directed to the speaker of the house of representatives who shall open and publish them in the presence of both houses of the legislative assembly; and in 1878, as now, the law also provided that the term of office of the governor ceases when his successor, having been declared elected by the legislative assembly as provided in the Constitution, shall be inaugurated by taking the oath of office. Prior to 1908, the law provided that the term of office of secretary of state, state treasurer and state printer "shall cease on the first day of the regular session of the legislative assembly next following the general election on which the terms of their successors shall begin": Deady's Code, p. 711; Section 3441, L. O. L. Prior to 1885, the biennial sessions of the legislative assembly began on the second Monday in September in the even-numbered years, but commencing with 1885 the sessions have begun on the second Monday in January in the odd-numbered years. The legislative assembly of 1876 elected L. F. Grover United States senator; and on February 1, 1877, Grover resigned as governor so that he could assume the duties of United States senator. W. W. Thayer was elected governor at the June, 1878, election, and at the same time R. P. Earhart was elected secretary of state. The legislative session which was held in 1878 convened on the ninth day of September. The speaker of the house of representatives having published the returns of the

election for governor in the presence of both houses of the legislative assembly, W. W. Thayer took the oath of office on September 11, 1878. Thus it is seen that the term for which Grover was elected governor began in September, 1874, and ended on September 11, 1878; and it is likewise seen that the term for which Chadwick was elected secretary of state began in September, 1874, and ended on September 9, 1878, and Earhart's term as secretary of state began simultaneously with the ending of Chadwick's term as secretary of state. Chadwick performed the duties of secretary of state during his entire term as such officer and in addition to performing the duties of that office he also discharged the duties of governor from February 1, 1877, the date of Grover's resignation, until September 11, 1878, the date of Thayer's inauguration as governor. Chadwick demanded of Earhart as secretary of state a warrant for \$2,420.75 covering the salary of governor for the period commencing February 1, 1877, and ending September 11, 1878. Upon the refusal of Earhart to issue the warrant, Chadwick began a proceeding for the purpose of compelling Earhart to issue a warrant for the full amount demanded. The parties submitted the case to the court upon an agreed statement of facts; and, among other things, the parties agreed as follows:

"Mr. Earhart objects to the salary being paid from the ninth day of September, 1878, to the eleventh day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after Mr. Earhart was sworn in on the ninth day of September, 1878, though Mr. Chadwick acted as governor or until and including the eleventh day of September, 1878."

We also find in the agreed statement of facts the following:

"That on the first of February, 1877, the said Stephen F. Chadwick being the secretary of state as

aforesaid duly qualified as governor of the State of Oregon and thereafter discharged the duties of said office of Governor of the State of Oregon during the remainder of the unexpired term of the said L. F. Grover. * * ,”

The language already quoted makes it plain that Earhart conceded that Chadwick was entitled to the salary of governor from January 1, 1877, to and including September 9, 1878, but that he denied and was only contesting the right of Chadwick to draw the governor's pay for September 10th and 11th, two days, on the ground that the right of Chadwick to perform the duties of governor ended with the end of his term as secretary of state. If, however, we assume for the purposes of the discussion that the pay for those two days was not the only point in controversy, yet all will no doubt admit that it was the main point presented for decision, for we find the parties saying in their agreed statement of facts that “Mr. Earhart objects to the salary being paid from the ninth day of September, 1878, to the eleventh day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after September 9th.”

The instant case presents an entirely different state of facts. Ben W. Olcott was re-elected secretary of state at the 1916 election and his term of four years as such officer will expire on the first Monday in January, 1921. James Withycombe was re-elected governor at the November, 1918, election, and if he had lived to complete his term of four years his incumbency would not end until 1923. But James Withycombe died on March 3, 1919; and since that time Ben W. Olcott has been discharging the duties of governor.

Having stated the essential facts involved in the two cases let us now compare them and ascertain whether

the doctrine of *stare decisis* has any application. In the Chadwick case there was an unexpired term and it was referred to by the parties in their agreed statement of facts as the "remainder" of Grover's term; and naturally the court, when passing upon the case used the language of the parties and referred to the only unexpired term then being considered as the "remainder" of the term. In the instant case there is also an unexpired term and therefore a "remainder." But the "remainder" in one case is essentially different from the "remainder" in the other case. Grover served through the first election occurring after his inauguration, but Withycombe did not. The "remainder" in the Chadwick case covered a period embracing only one election; the "remainder" in the instant case covers a period embracing two elections. During the "remainder" mentioned in the Chadwick case an election occurred and at that election a governor was elected. In the Chadwick case the question as to whether a governor could be elected was not and could not have been decided, because a governor was in truth elected. In the instant case no governor has yet been elected and the very question in dispute and the only question to be decided is whether a governor can be elected. The question as to whether or not Chadwick could have held through two elections and until 1878 if Grover had resigned on February 1, 1876, instead of February 1, 1877, was not involved in the Chadwick case; the court neither decided nor attempted to decide that question; and indeed, any attempt to decide that question would have been the purest *obiter dictum*. Since then the question of whether or not the people could elect a governor "was not before the court" in the Chadwick case, is it not manifest that the doctrine of *stare decisis* has no application what-

ever to the instant case, where the only question for decision is whether the people can elect a governor? And since the "remainder" spoken of in the Chadwick case is so widely, so materially and so inherently different from the instant case and since in the Chadwick case the question which the court was called upon to decide was so utterly different from the question now presented for decision, is it not clear that "we must," again borrowing language used in *Wilcox v. Warren Construction Co.*, "according to recognized principles, assume that the court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question?"

If the legal voters are permitted to elect a governor at the November, 1920, election, the person so elected could not take the oath of office until the speaker of the house first publishes the returns of the election in the presence of the two houses of the legislative assembly. A secretary of state will be elected in November, 1920, to succeed Ben W. Olcott as secretary of state, and the person so elected will assume the duties of the office on the first Monday in January, 1921; but by virtue of the ruling in the Chadwick case Ben W. Olcott would continue to occupy the office of governor not only until the first Monday in January, 1921, but also until the legislative assembly convenes in 1921 and the speaker of the house publishes the election returns and the elected governor takes the oath of office. The Chadwick case is authority for holding that Ben W. Olcott is entitled to the salary of governor so long as he discharges the duties of governor. The Chadwick case is authority for holding that Ben W. Olcott is entitled to occupy the office of governor until some person is elected and qualifies for the office. But the Chadwick case does not decide when a governor can be elected.

In the Chadwick case a governor had in truth been elected. The election of a governor was an accomplished fact. There was no occasion to decide or to attempt to decide whether a governor could be elected. The most that can be said for the Chadwick case is that it decided that Chadwick was entitled to occupy the office of governor until Thayer who had been elected, was sworn in and assumed the duties of the office.

The single question here for decision is whether the legal voters have a right to elect a governor at the next election. If the holding in the Chadwick case does not, when measured by the rules governing the doctrine of *stare decisis*, decide that question, then we must look to the Constitution itself for an answer; and if the language of that instrument does not solve the problem, then the question must be determined by general legal principles governing vacancies in elective offices.

Article V, Section 8, of the Constitution reads as follows:

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

Article XV, Section 1, provides that:

"All officers, except members of the legislative assembly, shall hold their office until their successors are elected and qualified."

Under the terms of these sections of the Constitution Ben W. Olcott can hold the office of governor until a governor is elected and has qualified; but these sections

do not tell us when that governor, who is to be elected, can be elected; nor does any other section of the Constitution contain language which alone and in express terms tells us that the governor, who is to be elected, shall be elected in 1920 or in 1922.

It is contended, however, in behalf of defendant that Article V, Section 8, takes the office of governor out of the general rule which regulates other offices, and that the office of governor is an exception to the general rule. The argument is that there never had been a vacancy in the office of governor. This argument proceeds on the theory that when the people elected Ben W. Olcott as secretary of state they also at the same time elected him governor, and that therefore when James Withycombe died and Ben W. Olcott assumed the office of governor he became an elected rather than an appointed governor; and that Olcott's accession to the governorship was contemporaneous with Withycombe's decease, so that there was not in fact any vacancy in the office of governor. This argument that Ben W. Olcott is an elected governor is answered by other sections of the Constitution. Article V, Section 1, of the Constitution provides that the governor shall hold his office for the term of four years and that "no person shall be eligible to such office more than eight years in any period of twelve years"; but it is also provided in Article II, Section 12, that "in all cases in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment *pro tempore* shall not be reckoned a part of that time." The mere reading of these provisions of the Constitution makes it plain that Ben W. Olcott is now serving under an appointment within the meaning of Article II, Section 12, and that the time so served is not to be counted as a part of the

eight years period mentioned in Article V, Section 1. The Constitution appoints the secretary of state as the person to fill the office of governor in the event the latter office becomes vacant by death or otherwise, while vacancies in other offices are filled by appointments made by the governor himself. The appointment of the secretary of state as the person to fill the office of governor is automatic and is made by force of the terms of the Constitution; but it is none the less an appointment.

It is further argued that there has been no vacancy in the office of governor. Matthew P. Deady, who was president of the convention that prepared the very Constitution which we are now considering, evidently construed Article V, Section 8, to refer to a vacancy in the office of governor, for in the Code compiled by Deady and Lane in 1874 they gave to Article V, Section 8, a marginal heading as follows: "In case of vacancy or disability"; and it may be noted that this same marginal heading appears in every Code that has been issued since that time. A vacancy in the office of governor is filled by an appointment and so too is a vacancy in the office of secretary of state filled by an appointment. In the one case the appointment is by the Constitution; in the other case it is by the governor. In the one case the person who is to be appointed is described by the Constitution; in the other case the person is not described and the governor is permitted to name whomsoever he chooses. In the one case the appointment is made instantly; in the other case some delay is unavoidably necessary and yet in both instances the appointment is mandatory, for even where the governor fills a vacancy by appointment he "shall," not "may," fill the vacancy by appointment. But in the final analysis there has been an appointment in

both cases; and in both cases the appointment is made to fill a vacancy, for without a vacancy there would be no appointment. The very fact of an appointment presupposes a vacancy. The circumstance that the appointment was instantaneous does not alter the situation. Frank W. Benson was elected secretary of state in 1910 but he died on April 14, 1911. Ben W. Olcott was appointed secretary of state on April 17, 1911, so that there was an actual vacancy from April 14th until April 17th. And in passing we may add that Ben W. Olcott did not take the oath of office as governor until March 7, 1919, although James Withcombe died on March 3, 1919. In 1912 Ben W. Olcott was elected secretary of state. At the very moment when the election was being held in 1912 the office of secretary of state was occupied and filled by Ben W. Olcott; and yet it is accurate to say that Ben W. Olcott, when elected in 1912, was elected to fill a vacancy caused by the death of Frank W. Benson. And so, too, if a governor is elected in 1920 he will be elected to fill a vacancy caused by the death of James Withcombe in exactly the same sense as in the case where Ben W. Olcott was elected to fill a vacancy in the office of secretary of state.

As the writer reads and construes the Constitution the right of the voters to elect a governor is the same as and no different from the right of the voters to elect a secretary of state in the event a vacancy occurs in the latter office by death, resignation or otherwise. If, in this respect, the office of governor is subject to the same rule as the office of secretary of state, then regardless of whatever the rule may be in the other jurisdictions we are controlled by precedents in this state holding that a vacancy in an elective office, in the absence of an organic or statutory law to the contrary,

causes the office to revert to the people, the source from whence it came, again to be filled by them. This branch of the case need not be elaborated further, for it is fully discussed in the precedents relied upon in *State ex rel. v. Kellaher*, 90 Or. 538 (177 Pac. 944).

The principle that the death, resignation or removal of an elected officer leaves a vacancy and that such vacancy, in the absence of express legislation to the contrary, shall be filled by the legal voters at the very next regular election, if there be sufficient time, has been recognized and invariably followed and applied during an unbroken period of 49 years, beginning with *State ex rel. v. Johns*, 3 Or. 533, decided in 1870, and ending with the recent case of *State ex rel. v. Kellaher*, 90 Or. 538 (177 Pac. 944). In *State ex rel. v. Johns*, a county judge was elected in June, 1866, for a term of four years. He qualified in July, 1866, but died in September of that year. The governor appointed a person to fill the office, but at the June, 1868, election, not the June, 1870, election, a successor was elected. In *Baker v. Payne*, 22 Or. 335 (29 Pac. 787), the legislative assembly of 1891 created the office of attorney general and provided that an attorney general "shall be elected" at the general election held in June, 1894, for the term of four years and "until his successor is elected and qualified." A separate section of the act provided that in case of a vacancy in the office the governor "shall" appoint a suitable person who "shall" hold the office until the next general election when his successor shall be elected and shall qualify. The act also made it the duty of the governor to appoint some person as attorney general as soon as the act became effective; and accordingly on May 21, 1891, the governor appointed an attorney general. The question involved was whether the appointed attorney general

held until the election of 1894 or whether an attorney general could be elected in 1892 to serve until 1894, at which latter time an attorney general was to be elected for a term of four years; and yet, notwithstanding the fact that there was ample reason for holding that the legislature intended that the appointed attorney general should hold the office until 1894, the principle of the right at the very next election to fill a vacancy in an elective office by an election was decreed to be so thoroughly established that it was held that an attorney general could be elected in 1892.

The principle was strictly followed when the death of Frank W. Benson caused a vacancy in the office of secretary of state. Frank W. Benson was elected secretary of state at the 1910 election for a term of four years; and he died in April, 1911. Had he lived and served through his full term he would have occupied the office through two elections, one in 1912 and another in 1914. After the death of Benson the governor appointed Ben W. Olcott on April 17, 1911. The appointee did not serve as appointee merely through the next ensuing election and until the second election, but upon the contrary at the very first election after the death of Benson the people voted for a secretary of state and selected Mr. Olcott and then in 1916 he was re-elected to the office. Thus it is seen that the invariable practice, sanctioned and enforced by this court and followed by the voters, has been to fill a vacancy at the first election.

The provisions in the federal Constitution relating to the President and Vice-president do not furnish any analogy to the provisions of our state Constitution relating to the governor and secretary of state. The federal Constitution provides that the President and Vice-president shall be elected "together" for "the

term of four years" and consequently upon the death of the President, the Vice-president occupies the office of President until the end of four years and a President cannot be elected before that time as the President, when elected, must be elected "together" with a Vice-president. A governor was not elected in 1912 when Ben W. Olcott was elected secretary of state; nor was a governor elected in 1916 when Ben W. Olcott was re-elected secretary of state. If the governor and the secretary of state must be elected "together," then the people had no right to elect a secretary of state in 1912 nor in 1916, with the result that Ben W. Olcott has been holding the office of secretary of state merely as an appointee since April, 1911, and has at no time been an elected officer. Under the terms of the federal Constitution a President cannot be elected at all unless he is elected "together" with a Vice-president. No such language appears in our state Constitution.

The reasons for my dissent given in *Olcott v. Hoff* and assigned herein may be summarized thus: If *Chadwick v. Earhart* had never been decided and if Article V, Section 8, of the Constitution had never been previously considered by the court I would take the view that Ben W. Olcott could discharge the duties of the office of governor only until the end of his term as secretary of state, which will occur on the first Monday in January, 1921, and that whoever is elected secretary of state in November, 1920, would on the first Monday in January, 1921, assume the duties of governor and discharge them during the few days which would intervene between the first Monday in January and the day when the speaker of the house publishes the election returns for the office of governor; but since it was decided in *Chadwick v. Earhart* that Chadwick

could hold the office of governor until an elected governor could be inaugurated, it follows that Ben W. Olcott can hold the office of governor not only until the first Monday in January, 1921, the date when his term as secretary of state expires, but also until such time as an elected governor can take the oath of office and assume the duties of the position. The case of *Chadwick v. Earhart* does not afford any foundation for the doctrine of *stare decisis* and the instant case is not governed by the rule of *stare decisis*. The governing facts in the Chadwick case are materially different from the controlling facts in the instant case. In the Chadwick case, the only question for decision was whether Chadwick, who had been elected secretary of state, could hold the office of governor during the brief period of two days which intervened between the end of his term as secretary of state and the inauguration of an elected governor. Here the question is whether Ben W. Olcott, whose term as secretary of state will end on the first Monday in January, 1921, can hold the office of governor for a period of two years after the end of his term as secretary of state, in spite of the fact that there will be a regular biennial election in November, 1920, as well as one in November, 1922; there a governor had in truth been elected, while here no governor has yet been elected; there the only question which was decided was that the secretary of state could hold the office of governor until an elected governor could be inaugurated, while here it is conceded that the secretary of state can hold the office of governor until an elected governor can be inaugurated; there a governor was elected at the very first election occurring after the office of governor became vacant, while here no governor has yet been elected, and the only question to be decided is whether a governor can

be elected; there the court was not called upon to decide when a governor could be elected, while here that is the sole question for decision. Since the Chadwick case does not decide or attempt to decide when a governor can be elected, our investigation and decision of the question presented here is unhampered and uncontrolled by any prior adjudication; and therefore we must first look to the Constitution itself and see whether it tells us when the governor is to be elected. Upon turning to that instrument we find that Article V, Section 4, tells us that "the governor shall be elected by the qualified electors of the state at the times and places of choosing members of the legislative assembly"; and upon further investigation we find that November, 1920, is the time when and the voting places throughout the state are the places where the qualified electors of the state will choose members of the legislative assembly. The Constitution does not state in express terms, nor does it impliedly say, that a governor cannot be elected at the next election; and therefore we must, on that account, ascertain what the general rules of law are. The rule in this jurisdiction has always been that when an elective office becomes vacant the legal voters have the right in the absence of a statute to the contrary, at the next election, if there be sufficient time to make use of the election machinery, to elect some person to the office. This rule has been enforced by this court in previous cases; and it has been observed by the voters, notably when Ben W. Olcott was elected secretary of state to fill a vacancy caused by the death of Frank W. Benson. Applying the general rule which governs elective offices we are then brought to the conclusion that the legal voters are entitled to elect a governor in November, 1920.

For the reasons which I expressed in *Olcott v. Hoff* and for those given herein I am unable to agree with the conclusion reached by a majority of my associates.

BENSON, J., concurs.

BURNETT, J.—I concur in the argument of Mr. Justice HARRIS in his limitation of *Chadwick v. Earhart*, and likewise I concur in the result of his opinion.

If the present secretary of state is now indeed the governor, he can resign the latter office. Such a resignation would not affect the duties imposed upon a governor, for there would still be in office the present elected, qualified and acting secretary of state, who is charged by the Constitution with the performance of those duties until a governor shall be elected. The secretary of state's tenure of office as such is the utmost limit of his authority to discharge the duties of the governor's office. It is further limited by the right of the people to choose their governor at the first opportunity afforded by a general election. The secretary of state has no other or additional hold on the gubernatorial office. It is only because he is secretary that he can perform the duties of governor.

Election is the rule and appointment is the exception in filling vacancies in constitutional offices. The exception ought not to be expanded by construction so as to narrow the rule. For these reasons I am of the opinion that the people are entitled to elect a governor at the next general election and that the writ should be made peremptory.

Argued November 25, 1919, reversed and remanded January 20, 1920.

MONTESANO LUM. & MFG. CO. v. PORTLAND IRON WORKS.

(186 Pac. 428.)

Trover and Conversion—Possession is Sufficient Proof of Ownership Against One Showing No Title.

1. Actual possession of a chattel at the time of the conversion thereof is sufficient evidence of title, in trover against one who shows no title.

[As to title on which action may be maintained, see note in 1 Am. Dec. 585.]

Trover and Conversion—Possession Under Claim of Title of Land is Proof of Ownership of Machinery Taken Therefrom.

2. Possession of land, either under title or under claim of title, is sufficient proof in trover of the ownership of machinery appurtenant thereto and taken therefrom.

Trover and Conversion—Deed and Lease Held Sufficient Proof of Title to Machinery on Land.

3. A warranty deed to plaintiff under which it was in possession and a lease of the land making the machinery thereon the property of the lessor is sufficient proof of plaintiff's ownership of the machinery to avoid a nonsuit.

Trover and Conversion—Testimony That Plaintiff Owned "Mill" is Evidence of Ownership of the Machinery.

4. Testimony that plaintiff owned the sawmill is evidence that it owned the machinery therein, since the term "mill," in modern usage, includes various machines or combinations of machinery.

Trover and Conversion—Proof of Title from Source to Land from Which Machinery was Taken Unnecessary.

5. To recover for the conversion of machinery in a sawmill vested in plaintiff under a lease by it of the mill site, proof of chain of title to the mill site from the government is unnecessary.

Courts—Trover for Conversion of Mill Machinery is Transitory.

6. An action to recover for the conversion of mill machinery by taking it from the mill site is not an action for damages to the land, but is transitory, and may be maintained in a state other than that in which the site is located.

[As to right to maintain action for conversion of timber, crops, buildings, etc., in another state or county, see notes in 34 L. R. A. (N. S.) 994; 44 L. R. A. (N. S.) 268.]

Evidence—Counsel's Statement That Lease was Assigned in Writing may be Considered.

7. The statement of defendant's attorney during a colloquy in court that a lease had been assigned in writing may be considered by the jury as showing an assignment.

Landlord and Tenant—Proof That Stranger Held Under Lease Raises Presumption of Assignment.

8. Oral proof that a corporation, not the lessee, took possession of the leased property and held it under the terms of the lease, installing the machinery as agreed therein, is admissible, and raises the presumption of assignment of the lease.

Trover and Conversion—Measure of Damages is Market Value.

9. The measure of damages for the conversion of personal property is the market value of the property at the time and place of the conversion.

Trover and Conversion—Evidence of Value Held Sufficient to Avoid Nonsuit.

10. Testimony of two witnesses as to the value of the machinery converted held sufficient evidence of value to avoid a nonsuit.

Trover and Conversion—"Reasonable Value," "Fair Cash Value," and "Actual Cash Value" are Synonyms.

11. "Reasonable value," or "fair cash value," and "actual cash value" are practically synonymous terms, and mean the fair or reasonable cash price for which the property can be sold on the market.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

This is an action for the conversion of personal property. At the close of plaintiff's case, defendant interposed a motion for a judgment of nonsuit which was granted. The plaintiff appeals.

The complaint, after setting forth the incorporation of the plaintiff and defendant and the history of the ownership and leasing of a certain sawmill and sawmill site located in Chehalis County, Washington, immediately south of the City of Montesano, and the forfeiture of such lease, alleges as follows:

"That on and prior to the — day of June, 1913, plaintiff, being the owner in possession of the machinery, tools, implements, appliances and personal property aforesaid, the said defendant, acting by and

through its officers, agent and employees, did unlawfully and wrongfully and against the protests of the said plaintiff, take and remove from said premises the machinery, tools, implements and appliances, being the same personal property which it, the said defendant, had theretofore sold and delivered to the said Montesano Mill Company, and wrongfully and unlawfully converted the same to its own use and continues so to do; that plaintiff has demanded from the said defendant payment of the value of said personal property so converted, but said demand has been refused."

Plaintiff also avers that the personal property is reasonably worth \$7,500, in which sum plaintiff has been damaged. Attached to the complaint, as an exhibit, is a copy of the lease referred to.

The answer of the defendant admits the incorporation of the parties and denies the remainder of the complaint. The cause was tried to the court and a jury. The testimony produced in behalf of plaintiff tended to show that on May 18, 1911, the Montesano Lumber and Manufacturing Company was the owner, and in possession of a sawmill and mill site located near Montesano, Washington; and on that date it leased the premises and mill including all buildings and machinery, boom works and docks and all property both real and personal used in connection therewith, excepting certain land, to J. W. Sumrall, A. B. Crosier and A. K. Foss, for a rental of \$300 per month. The lease contained, among other things, the following agreement:

"It is agreed that whereas the said mill at this time needs new machinery and equipment, that second parties shall furnish as advance payment upon said rent, certain machinery and equipment, a list of which has this day been agreed upon, which machinery and equipment, with the cost of installation, shall not exceed ten thousand (\$10,000) dollars, and up to that amount they

shall be allowed a credit upon the rental to be paid by them, but for any machinery, or equipment, or cost of installation, beyond that amount then they shall receive no credit upon said rent due under this lease. To entitle second parties to said credit or machinery, equipment and cost of installation, the first party will be consulted concerning the plan, character, and class of the machinery furnished and installed; that upon such installation the machinery and equipment so furnished shall be and become the property of the lessor and therefor the lessees shall receive credit at the rate of three hundred (\$300) dollars per month, which shall be applied so far as may be towards the advance payment of said rent."

The lease also contained the following stipulation:

"It is agreed that the lessees shall not assign this lease, nor any interest therein, and that if they sublet all, or any part of said leased premises, they shall then remain personally bound to perform all the conditions of this lease; provided, however, that it is understood that this lease may be assigned by the lessees to a corporation organized by them for the purpose of operating the said mill. In which event, the said corporation shall be liable to keep and perform all the conditions of this lease."

The lease further provided that if the lessees make default in any of the terms or conditions of the lease, then the lessor might terminate the lease without further notice, and thereupon be entitled to the immediate possession of the leased property together with all betterments, improvements, machinery and equipment added by the lessees, "or the corporation succeeding to their interests, or by any person acting under them."

The testimony of George W. Ninemire purported to show the following facts and circumstances. A short time after the execution of the lease, the mill property was turned over to a new concern by the name

of Montesano Mill Company, in conformity with the agreement in the lease. The Mill Company took possession of the plant, installed new machinery, and operated the mill about six months pursuant to the terms of the lease and recognized the plaintiff as its landlord. In June, 1913, the lease having been forfeited and the plaintiff having entered into possession of the mill property, it was the owner and in possession of the mill and mill property including all of the machinery that had been installed by the Montesano Mill Company. While the plaintiff was the owner and in possession of the property including the machinery in question, the defendant entered upon the premises, and against the protest of plaintiff removed the machinery, which was of the "reasonable value" of \$3,500. A deed of the mill site from certain parties to plaintiff was introduced in evidence.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Bridges & Bruener* and *Messrs. Teal, Minor & Winfree*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the name of *Messrs. Wilson, Neal & Rossman*, with an oral argument by *Mr. O. A. Neal*.

BEAN, J.—It is contended on behalf of defendant, in support of the nonsuit, that the plaintiff failed to prove that the lease was assigned in writing to the Montesano Mill Company, and also failed to prove the ownership of the personal property alleged to have been converted in the manner set forth in the complaint. No testimony was introduced in behalf of defendant.

1, 2. It is laid down as a rule that in an action of trover and conversion, possession of the personal property is *prima facie* evidence of title, and conversion may be inferred from the taking of property and neglect to return it: 38 Cyc. 2077. Evidence which raises a necessary implication of ownership will, if not restricted or disputed, sustain a verdict for plaintiff. Actual possession of a chattel at the time of the conversion thereof is sufficient evidence of title in trover against one who shows no title; and possession of land, either under a title or a claim of title, is sufficient proof of ownership in an action for the conversion of crops, or timber, or machinery appurtenant to the land, which is asported: 38 Cyc. 2085, 2086; *Harvey v. Lidvall*, 48 Or. 558, 561 (87 Pac. 895); *Dodge v. Irvington Land Co.*, 158 Ala. 91 (48 South. 383, 22 L. R. A. (N. S.) 1100, 1102); *Cottrell v. Pickering*, 32 Utah, 62 (88 Pac. 696, 10 L. R. A. (N. S.) 404, 408); *Spurlock v. Port Townsend Southern Ry. Co.*, 13 Wash. 29, 30, 31 (42 Pac. 520); *Dicus v. Major*, 72 Wash. 398, 401, 402 (130 Pac. 474); *Hutchinson v. Perley*, 4 Cal. 33 (60 Am. Dec. 578).

3. The deed of the mill premises of F. L. Carr et al. to the plaintiff, the Montesano Lumber and Manufacturing Company, introduced in evidence by plaintiff, coupled with evidence tending to show the possession of plaintiff thereunder together with the lease which was in the nature of a bill of sale of the machinery to the plaintiff, was proof of title and ownership of such land and personal property: *Cottrell v. Pickering*, 32 Utah, 62 (88 Pac. 696, 10 L. R. A. (N. S.) 404, 408); *Dodge v. Land Company*, 158 Ala. 91 (48 South. 383, 22 L. R. A. (N. S.) 1100 and note).

It is stated in 26 Am. & Eng. Ency. Law (2 ed.), 674:

"It is very generally recognized, that the possession of chattels, conferring, as it does, title good as against everyone but the true owner, will enable the person in possession to maintain trover therefor against a wrongdoer who takes the chattels from his possession and wrongfully converts them, and the wrongdoer cannot set up the title of the true owner in defense to the action, or even in mitigation of damages."

This court approved this statement in *Harvey v. Lidvall*, 48 Or. 558, at page 561 (87 Pac. 895).

4. The testimony of the president of the plaintiff company indicated that the plaintiff had a sawmill and also owned the mill site and was in possession thereof; that it never parted with the title thereto. In 5 Words & Phrases, 4506, we find:

"The term 'mill,' in modern usage, includes various machines or combinations of machinery, as cotton-mills, fulling-mills, powder-mills, etc."

There can be little question but that the witness of plaintiff, in referring to the ownership and possession of the sawmill, intended to say that the plaintiff was the owner and in possession of the machinery which constituted the sawmill, and that the jury would have so understood his testimony. This is illustrated in the cross-examination of the witness by counsel for defendant when the inquiry was made:

"Q. Now, Mr. Ninemire, was this mill dismantled afterwards, did it ever run after the machinery was removed?

"A. Never did.

"Q. The remainder of the machinery was removed?

"A. Yes.

"Q. It was dismantled?

"A. Yes.

"Q. It is not a sawmill now?

"A. No."

5. The personal property, or mill machinery, described in the complaint is the gravamen of this action, and not the real estate upon which the same was located at the time it was removed by the defendant. Therefore it would be superfluous to require the plaintiff to prove a chain of title to the land embraced in the mill site, from the government to the plaintiff as suggested by counsel for defendant.

6. Another point contended for by defendant, is that the action involves damages to real property located in the State of Washington, and is a local action and the court therefore had no jurisdiction. The following authorities apply to both of the last questions mentioned.

This controversy between plaintiff and defendant was previously before this court in another form, in the case of *Montesano Co. v. Portland Iron Works*, 78 Or. 53 (152 Pac. 244). The court dismissed the case on the ground that the suit was one to recover damages to real estate, and was therefore local and would have to be brought in the state where the real estate was. This court speaking of the identical machinery said:

“The purport of the lease is that the lessee shall pay \$300 per month as rent for the mill, and that \$10,000 shall be paid in advance in machinery and equipment to consist of certain articles specified in the lease, and that upon the installation of such machinery and equipment it shall be and become the property of the lessor. * * The consideration paid was the giving of the lease and putting the lessee into possession of a valuable mill. So far, then, plaintiff has shown a right to recover damages unless defendant's contention that this is an action to recover for injuries to real property has been sustained. * * We do not wish to be understood as holding that the plaintiff cannot recover in the courts of this state in an action for the trover

and conversion of the machinery removed. We think the better authorities indicate that it can."

An action for trover and conversion of machinery, fixtures, trees or other property taken from real estate, may be maintained in a state other than the one in which the real estate is located, on the theory that the machinery, fixtures, trees, etc., after removal are personal property. The present case is a transitory action: *Tyson v. McGuineas*, 25 Wis. 656; *Riley v. Boston*, 11 Cush. (Mass.) 11; *Forsyth v. Wells*, 41 Pa. 291 (80 Am. Dec. 617); *Wright v. Guier*, 9 Watts (Pa.), 172 (36 Am. Dec. 108). A late case on the subject is *Brady v. Brady*, 44 L. R. A. (N. S.) 279 (161 N. C. 324, 77 S. E. 235), where the syllabus reads:

"An action to recover the proceeds of timber wrongfully severed from real estate is transitory and may be brought in the courts of a state other than that where the land is located."

The cases cited in defendant's brief, in support of the argument that the case is local, are not in point.

7. Defendant urges that in order for plaintiff to prove ownership of the personal property involved herein, it must show among other things, that the lease was assigned by the lessees to the Montesano Mill Company. Mr. Ninemire testified in effect, that the lease and mill property were turned over to the Montesano Mill Company. He did not know whether the assignment was in writing or not. In view of the following statement made by counsel for defendant, upon the trial of the case, it would seem there was little controversy upon this point. We find in the record the following inquiry by counsel for plaintiff and answer by counsel for defendant:

"Mr. Bridges: * * I would like to ask counsel if in the trial of this case before, counsel didn't admit in the

records, that this lease had been assigned and was owned by the Montesano Mill Company.

"Mr. Wilson: I want to answer that I did; and I want to say right there I robbed my client. *This assignment is in writing. I have a copy of it in my fingers*, and he knows where I got it, and he was present and saw it.

"Mr. Neal: This assignment of the lease was made by Foss, Crosier, and another man to the Montesano Mill Company."

8. We see no reason why the jury should not consider the part of the statement of counsel for defendant, which we have underscored. There appeared to be no issue as to the form of the assignment. However, plaintiff could prove orally that the Montesano Mill Company took possession of the property, and held possession under the terms of the lease, and in compliance with the lease installed the machinery in question and recognized the plaintiff as the lessor: *Dickinson Co. v. Fitterling*, 69 Minn. 162 (71 N. W. 1030, at page 1031). Where leased property is found in the possession of one other than the lessee, the presumption is that the occupant is an assignee: *Weide v. St. Paul Boom Co.*, 92 Minn. 76 (99 N. W. 421, at page 422); *Ebling v. Fuylein*, 2 Mo. App. 252; *Bedford v. Terhune*, 30 N. Y. 453 (86 Am. Dec. 394). See note in 52 L. R. A. (N. S.) 986. This court, in the case of *Leadbetter v. Pewtherer*, 61 Or. 168 (121 Pac. 799, Ann. Cas. 1914B, 464), held that where a person, other than the lessee, is shown to be in possession of leased premises, paying rent therefor, the law will presume that the lease has been assigned to him. Moreover the lease contains the provision that upon default of any of the terms of the lease the lessor—

"Shall thereupon be entitled to the immediate possession of the leased property, together with all better-

ments, improvements, machinery and equipment added by the lessees, or the corporation succeeding to their interests, or by any person acting under them."

The testimony tended to show that the Montesano Mill Company entered into possession of the mill property, and accepted the lease and performed some of the conditions thereof, and we hold there was some evidence of the assignment of the lease.

9. Defendant contends there was no evidence to prove the market value of the machinery. With this we are unable to agree. The general rule for the measure of damages for conversion of personal property is the market value of the property at the time and place of conversion: *Swank v. Elwert*, 55 Or. 487 (105 Pac. 901).

10. The testimony as to the value of the machinery was given by the witnesses, George N. Ninemire and L. H. Potter. The testimony of Mr. Ninemire on the subject is in part as follows:

"Q. Do you know the value of machinery of that character?

"A. I do. * *

"Q. Are you acquainted, and were you acquainted, at the time, with the value of machinery such as the machinery involved here?

"A. I was building a sawmill and buying machinery all over the country.

"Mr. Neal: It is a question as to what the market value of the machinery was at the particular time and place. * *

"Q. Get at the value of machinery, tools and implements which they removed from this property, not what they put in. They might have put in more or less.

"A. It was worth about \$3,500, that is, taking the machinery second hand as it was after it was taken out. That is not the first cost of it. It was worth more money."

Mr. Potter testified, substantially, as follows: That he had lived in Montesano for six years; that he was a master mechanic of the construction of mills, and had been engaged in that line of work for twenty-one years; that he was acquainted with the plant of the Montesano Lumber and Manufacturing Company, in Montesano. He was then asked:

"Q. Did you know the property which was taken out of the Montesano Lumber & Manufacturing Co. by some people along in June, 1913?

"A. I could not say exactly for the year. * *

"Q. Did you see the property and know what was taken out?

"A. Yes, I know the machinery.

"Q. Did you at the time know the reasonable value of the machinery? Answer that, yes or no."

After objection and some discussion by counsel, the witness continued:

"A. Price of property on the ground? * *

"Q. I want to know whether at the time you were acquainted generally with mill machinery?

"A. Yes. * *

"Q. I will ask you to state what was the reasonable value of the machinery which was at this time taken out of this Montesano Lumber & Manufacturing plant, basing the value immediately after the property was taken out of the mill, and while it was on the wharf or in the vicinity of the mill at Montesano?

"A. Thirty-five hundred dollars."

The witnesses evidently referred to the market value of the personal property. All of this testimony was introduced over the objections and exceptions of counsel for defendant.

11. "Reasonable value" or "fair cash value" and "actual cash value" are practically synonymous terms. In Words & Phrases, page 152, we find:

"The actual cash value of the property, is the price it will bring in a fair market, after fair and reasonable efforts have been made to find a purchaser who will give the highest price. The actual cash value, then, is the fair or reasonable cash price for which the property can be sold in the market."

The general rule is stated in 38 Cyc. 2092, thus:

"In trover the measure of damages is the fair, reasonable value of the property converted, which will be presumed to be either what it was worth on the market, irrespective of the price paid for it, or the amount it was subsequently sold for, or what it was actually worth if it had no market value."

We think the objection of the defendant would go to the weight of the testimony and not to the competency thereof. The testimony relating to the value was not restricted to the value of the machinery for the purpose used, as in *Swank v. Elwert*, 55 Or. 487 (105 Pac. 901), relied upon by defendant. We conclude there was some competent evidence as to damages to be submitted to the jury and that the testimony on behalf of plaintiff was sufficient to make a *prima facie* case, entitling plaintiff to some amount as damages. It was error to sustain the motion for a nonsuit.

The judgment of the lower court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and HARRIS and BENNETT, JJ.,
concur.

Argued at Pendleton October 29, affirmed December 23, 1919, rehearing denied January 20, 1920.

LOONEY v. SEARS.

(185 Pac. 925; 186 Pac. 548.)

Adverse Possession—Title Need not be Perfect.

1. It is not necessary, to make possession adverse, that a party should have a perfect title, or that he should even think he has a perfect title, but, on the contrary, he may know his title is weak and defective.

[As to what constitutes color of title sufficient to sustain action of adverse possession, see notes in 14 Am. Dec. 580; 86 Am. St. Rep. 701.]

Adverse Possession—Sustained by Evidence.

2. In an action to quiet title, under claim of title by adverse possession, evidence *held* sufficient to sustain a judgment for plaintiffs, although the person under whom plaintiffs claim failed to pay the taxes on the land, and did not return the same on his tax list.

PETITION FOR REHEARING.

Adverse Possession—Confers Fee-simple Title by Operation of Law.

3. Adverse possession for more than 10 years confers fee-simple title by operation of law.

Ejectment—Title by Adverse Possession Available as Defense.

4. One acquiring title to land by adverse possession can successfully defend an ejectment action brought by the owner of the record title.

Quieting Title—Record Title is Cloud on Title by Adverse Possession.

5. The deed to the owner of the record title is a cloud on the title acquired by adverse possession which the party having title by adverse possession may sue to remove.

Taxation—Holder of Record Title is not Entitled to Reimbursement from Adverse Claimant for Taxes Paid.

6. The holder of the record title to land in the adverse possession of another was paying taxes on his own land during the ten years necessary to give title to the adverse claimant, and thereafter was a mere volunteer with no right to reimbursement from the adverse claimant.

Taxation—Record Owner Redeeming from Tax Sale not Entitled to Reimbursement from Adverse Holder.

7. Under Section 3124, B. & C. Comp., providing that any redemption from a tax sale shall inure to the benefit of the person having the legal or equitable title subject to the right of the person making the redemption to reimbursement by the person benefited, the redemption by the owner of the record title of land in the

adverse possession of another inures to his own benefit and gave him no right to reimbursement.

Taxation—Right of Person Redeeming from Tax Sale is Governed by Statute Then in Force.

8. Laws of 1907, page 480, Section 69, requiring one suing to remove the cloud of a tax title to deposit all payments by the purchaser with interest, gave no right to interest to one redeeming from a tax sale in 1904, in view of Section 80, continuing the old statute in force as to taxes previously accruing.

Interest—Recovery Depends on Statute.

9. The right to recover interest as such must be found in the statute which confers it, and unless included it must be deemed excluded.

Damages—Taxation—Record Owner of Land in Adverse Possession of Another is not Entitled to Interest on Taxes Paid.

10. Payments of taxes on land in the adverse possession of another by the record owner who had redeemed from a tax sale were not within the interest statute (Section 6028, L. O. L., as amended by Laws 1917, p. 781), nor was interest recoverable as damages.

From Gilliam: DAVID R. PARKER, Judge.

In Banc.

This is a suit brought to quiet title to a strip of land described as follows:

Southeast quarter of northeast quarter, and the east half of the southeast quarter, of section 5, and the northwest quarter of the northwest quarter, of section 9, all in township 4, south of range 20, E. W. M. Gilliam County, Oregon.

The lands in question were originally what is generally known as "Forfeited Northern Pacific Railroad lands."

These lands were for a long time supposed to be a part of the land grant of odd sections to the Northern Pacific railroad, and were held by it for many years as a part thereof. However, in 1890 Congress passed an act forfeiting them. Prior to that time many persons had settled upon the lands under contracts with the Northern Pacific Railroad, expecting to purchase the same ultimately from that company. The act of Congress recognized their possessory rights and provided

that under certain circumstances and conditions they might purchase the lands so held.

Long prior to 1900 one William S. Bean had taken a homestead on the even section adjoining the land in dispute, and was in possession of the tract which is in dispute—probably in connection with his homestead—claiming it as railroad land.

At some time prior to 1890 William Looney seems to have purchased from Bean, the possessory right to Bean's homestead claim. About that time Bean moved away and left the country. Looney seems to have remained in possession, both of the homestead claim upon which he filed, and also the railroad land, which is now in dispute. Either at the time of the purchase of the homestead, or at some later time, there seems to have been some arrangement or oral contract between Bean and Looney in relation to the purchase of Bean's right to the railroad land.

In the year 1898 Bean filed upon and purchased the land under the act of Congress at \$1.25 an acre, making an affidavit at the time that he was in possession of the land, and had been ever since prior to the year 1890 claiming it as Northern Pacific Railroad land, and expecting to obtain title to it from said company. Looney assisted him in making this proof and made a corroboratory affidavit.

On May 22, 1899, the government issued a patent to Bean for the land. Shortly afterwards and during the year 1900 there seems to have been a controversy between Bean and Looney, as to the terms and conditions under which Bean was to transfer the land to Looney, and Bean refused to make a deed of the land to Looney. He finally repudiated the transaction with Looney altogether, claiming that Looney had failed to comply with the terms of the contract on his part, and Bean there-

upon in the year 1901 transferred the land in question to Sears, the defendant herein. According to the testimony, Sears paid a consideration of about \$725 for the land. About \$600 of this was in satisfaction of a previous debt, and \$125 was paid to Bean and his wife in cash.

Shortly after this transaction, Sears placed his deed from Bean upon the record and is now the unquestioned holder of the record title.

Bean and Looney are both dead, and this suit is brought by the heirs of Looney against Sears to quiet title, plaintiffs alleging that William Looney and his representatives have held adverse possession of the tract in question from the year 1890 up to the time of the commencement of this suit, which was about June, 1918. The only question in the case is whether or not the plaintiffs have title to the land by adverse possession.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Ramsey, Lange & Nott*, with an oral argument by *Mr. William Ramsey*.

For respondents there was a brief and an oral argument by *Mr. T. A. Weinke*.

BENNETT, J.—There is no question but what the plaintiffs and their ancestor, William Looney, have been in possession of the land from the year 1900 up to the beginning of this suit. Neither can there be any serious question but what that possession was open, notorious and exclusive.

The undisputed evidence shows that William Looney had the land inclosed in the year 1900 (partly by his own fence, partly by the fence around his homestead

adjoining and partly by connecting with the fences of other neighbors). In 1901 he built a house upon it, two stories high and 16x24 feet in diameter, and afterwards it was enlarged by one of his tenants. He also built a barn on the place. At first he used the land for grazing purposes, but some time prior to 1908, he commenced to cultivate about 15 acres, and in that year one of his tenants, by the name of Rickard, broke up an additional 40 acres, which has since been in cultivation. Looney rented the land out at different times to different parties—once to a man by the name of Simon for two or three years, and again to Rickard, who farmed it for six years—from 1909 to 1914. At the time of his death the improvements Mr. Looney had on the place in dispute were valued by the witnesses at about \$1,000 or \$1,200.

The only question, therefore, is whether or not this possession of Looney was adverse to the rights of the defendant and *under claim of right*. As Looney himself is dead, the evidence is necessarily largely inferential and circumstantial.

On the one hand, there is his long, continual possession and his continuous acts of ownership over the property. He fenced it, improved it, built a house and barn thereon and rented it to at least two different parties, and the further fact that he did not pay any rent or in anywise recognize any superior right of the defendant.

In addition to this, there is the testimony of Robert Looney, son of William Looney, and several neighbors living in the vicinity, who testified that William Looney always claimed to own the land, from the year 1900 down to the time of his death.

Against this, on the other hand, is offered the undisputed fact that Looney did not pay the taxes; that the

land was constantly assessed to Sears, and that Looney in four different years made sworn returns of his property to the assessor and omitted to list or mention this tract.

In addition to this the defendant offered the testimony of one Portwood, who was county clerk between 1901 and 1905, and who testified in relation to the matter as follows:

"A. Well, about all I remember was that he had furnished Mr. Bean the money to buy the land from the R. R. Company, expecting to get a deed to it when Mr. Bean got the title, and that he never got it. That is, Bean had never given him a deed.

"Q. What further did he say, if anything, about claiming the land, or his interest in it?

"A. Well, about all I remember was that at one time he talked to me about some one had advised him if he would pay the taxes on the land, it would give him some right to hold it in some way; he had that impression, and he asked me about it. He thought if he paid the taxes before Mr. Sears did, it might help his case. We had some conversation along that line; I don't remember exactly what it was.

"Q. Did he say whether he claimed to own the land?

"A. I never remember hearing him say he owned it, but he had possession of it, farmed it. He didn't talk to me as though he owned it. I understood it was to be assessed to Mr. Sears.

"Q. How long ago was that, if you remember?

"A. I don't remember. But it must have been between 1901 and 1905, probably, different times during that time."

And again on cross-examination:

"Q. Did he, at the time he asked you about the payment of taxes, did his idea seem to be he was going to retain possession, he was going to hold possession, and he was going to try to get a better hold?

"A. Yes; I presume that is what the idea was.

"Q. He was trying to hold the land, trying to get a better hold?"

"A. I don't know as to that. He simply asked me if I thought if he paid the taxes, he would have a better show to retain the land.

"Q. He was in possession of the land?"

"A. Yes."

Defendant also offers his own testimony as to a conversation he had with William Looney in 1904, at a time when he came up to redeem the land from a tax sale. He says of this conversation:

"He told me he ought to have that land; that he had an agreement with Mr. Bean, and that he ought to have that land. He says, 'He has acted the scoundrel with me.' He used very strong language. He says, 'If I have to leave that land I will hunt up Bill Bean and kill him; he has betrayed me.' I said, 'Mr. Looney, you would hardly do that, after second thought.'"

There is considerable testimony and much discussion in the briefs as to the nature of the contract between Bean and William Looney regarding the land. It is evident from the record that there was some kind of a deal between them, in relation to this land, prior to the time Bean deeded it to Sears in 1901; but as both Bean and William Looney are dead, the evidence remains very nebulous and unsatisfactory as to what the nature of that agreement really was.

As we view it, however, that is wholly immaterial, for whatever that agreement was Mr. Bean repudiated it, claiming that Looney had not complied with the contract upon his part and made it impossible for him to transfer the land to Looney or to comply with any agreement in relation thereto, which had theretofore existed by deeding the land absolutely to Sears. After Bean had thus repudiated the contract and transferred the land to another party, claiming that he was no

longer under any obligation to convey to Looney, it could hardly be said that Looney continued to hold under the contract.

We think Looney's continuous possession for so long a time; his assertion of ownership and right to the land; the placing of a valuable house and barn and fencing on the land; the renting it, and taking the rents and profits to himself, were such unequivocal acts of ownership, as to overcome the inference which might otherwise be drawn from his failure to pay the taxes, or to return the property upon his tax list.

It is true that his failure to pay the taxes on the land and his failure to return the same on his tax lists was persuasive evidence against his claim of right, and if his acts of ownership were otherwise equivocal or doubtful, his failure to pay the taxes might turn the scales against him. But while the failure to pay the taxes, or to return the property for taxation, is competent evidence and of considerable weight, it is by no means conclusive.

In 2 C. J. 203, it is said.

"Payment of taxes is not an element of adverse possession, unless made so by statutory requirement, and the fact that the owner of land held adversely by another continues to pay the taxes assessed on the land will not preclude the latter from acquiring title thereto by lapse of time."

In 2 C. J. 270, it is said:

"Adverse possession of land may be shown by proof of the acts of the claimant as well as by his oral declarations. Exercise of the usual acts of ownership over the land in dispute is evidence to show that the possession was hostile. The character of the possession cannot always be determined from the declarations of the person in possession because he may not make any, nor are his declarations always conclusive against one

claiming under him. Thus it is permissible to show a conveyance of the premises by the claimant, or an offer to convey them, or a mortgage, or a lease, or a devise thereof, by him, or that he prevented cattle belonging to others from running at large on the land, or built a residence thereon."

Nearly all of these distinguishing acts of ownership occurred in this case, and in addition thereto, the overwhelming testimony is, that Looney frequently, in connection with his possession, asserted that he owned and claimed the land.

In *Smith v. Badura*, 70 Or. 58, 61 (139 Pac. 107, 108), it is said:

"If such person uses the property as his own, that is one manner of declaring to the world, or the true owner, that he is asserting a title in hostility to the true title, and thenceforth the owner must beware. Such entry and use raises a presumption of the claim of right or title."

Again in *Dunnigan v. Wood*, 58 Or. 119, 124 (112 Pac. 531, 533), it is announced:

"Actual, open, notorious, distinct, and continuous possession of real property, under a claim of right, and not inconsistent with the other acts of the party or circumstances in the case, raise a presumption that the possession is hostile."

The statements of Looney to Portwood and to the defendant, do not seem to show that Looney was not claiming a right to the land. The statements to Portwood import, on the contrary, that he was claiming it, and seeking for means whereby he could make his right more effective. In the talk with Sears, he says:

"If I have to leave that land I will hunt up Bill Bean and kill him."

We think this language, in connection with the fact that he did not give up the land but continued in pos-

session, was an assertion of his claim of right. We do not say, "if I have to leave" a thing unless we are claiming that thing.

Of course, Looney knew all the time after Bean refused to make him a deed, that his title to the property was defective, and that he might have to give it up, but he was sticking in possession and by his actions sturdily asserting his claim, just the same.

1. It is not necessary to make possession "adverse" that a party shall have a perfect title, or that he shall even think he has a perfect title. On the contrary, he may know that his title is weak and defective and yet be holding adversely. In 2 C. J. 201, it is said:

"Mere knowledge on the part of claimant that the title was defective or was not a perfect title will not impeach the good faith of his purchase. Such knowledge is not in itself inconsistent with a *bona fide* claim of right."

In *Bessley v. Powder River Gold Dredging Co.*, 95 Or. — (185 Pac. 753), it is said by Judge BEAN, speaking for the court *in banc*:

"The terms 'claim of right,' 'claim of title' and 'claim of ownership,' when used in the books to express adverse intent mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right."

2. Here there was every element of adverse possession and that possession was continued for at least 17 years. For at least 14 years defendant Sears knew that Looney was in possession of the property, and ought to have known that he was exercising acts of ownership over the same.

In *Bessler v. Powder River Gold Dredging Co.*, 95 Or. — (185 Pac. 753), it is said:

“The Sumpter Lumber Co. knew, or should have known, of the possession and claim of plaintiff and his predecessors. An owner of premises is bound to take notice of the nature and extent of possession by claimant. The party holding the superior title is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within them without his authority.”

In this case the defendant having knowledge of Looney's claim and of his possession, slept upon his rights for a period of more than fourteen years. He is now in no position to assert them.

The decree of the court below is affirmed.

AFFIRMED.

Rehearing denied January 20, 1920.

PETITION FOR REHEARING.

(186 Pac. 548.)

On petition for rehearing filed January 7, 1920.

DENIED.

Messrs. Ramsey, Lange & Nott, for the petition.

Mr. T. A. Weinke, contra.

BURNETT, J.—It will be remembered that the plaintiffs began this suit against the defendant, claiming to have acquired title to the realty in question through their father, now deceased, by his more than ten years' adverse possession thereof and that a deed

from Bean, the patentee of the land, to Sears constituted a cloud on the title, which they desired removed. Sears answered, asserting his title, stating in substance that he had purchased the land from Bean, who was then the owner of it, in fee simple, on July 26, 1901, for a full and valuable consideration; and that he had paid the taxes thereon, giving the amount paid for each year from 1900 to and including 1914, amounting in all to \$236.87. He also averred that the taxes for 1899 became delinquent; that in satisfaction thereof the property was sold to the ancestor of the plaintiffs and that on May 9, 1904, Sears paid \$7.60 for the redemption of the land. The case was put at issue and after a decree for the plaintiffs, which, however, awarded to Sears a judgment against them for \$236.87, the amount of taxes he had paid directly, but omitted the \$7.60 which he had paid on redemption, he appealed. After a careful examination of the evidence in an opinion by Mr. Justice BENNETT this court concluded that the title of the plaintiffs by adverse possession has been established, and hence affirmed the decree. The defendant now moves to grant a rehearing or reconsideration of the cause so as to allow him not only the principal amount of taxes which he paid, but also the sum he paid in redemption, together with interest on each item from the date of its payment to the date of the decree.

3-5. It is unquestionable that the deed to Sears from Bean gave the former the fee-simple title in the land. We may safely assume for the purpose of this opinion that at that time the ancestor of the plaintiff had no title to the property. His subsequent adverse possession for more than ten years, however, conferred upon him the fee-simple title by operation of law, notwithstanding the deed under which Sears claims: *Causfield v. Clark*, 17 Or. 473 (21 Pac. 443, 11 Am. St. Rep. 845);

Dunnigan v. Wood, 58 Or. 119 (112 Pac. 531); *Stout v. Michelbook*, 58 Or. 372 (114 Pac. 929); *Parker v. Wolf*, 69 Or. 446 (138 Pac. 463); *Parker v. Kelsey*, 82 Or. 334 (161 Pac. 694); *McKinney v. Hindman*, 86 Or. 545 (169 Pac. 93, 1 A. L. R. 476). Although the ancestor became the owner at the end of that decade, he was without a record muniment thereof. At that time he could have successfully defended an ejectment action brought by Sears if he could have convinced the jury of that adverse possession. A judgment in his favor would have constituted record evidence of Looney's title. He was not, however, compelled to await the initiative of Sears. On the contrary, Looney or his successors in interest, as they did in this suit, could take the initiative and sue to remove the cloud caused by Bean's deed to Sears, and thus establish the Looney title of record. Bean's deed was a cloud on that title thus founded in adverse possession. This is true according to the test laid down in *Pixley v. Huggins*, 15 Cal. 127, to this effect, that if Sears, armed with a deed from the patentee, had commenced ejectment against the plaintiffs or their ancestor at any time after the expiration of the ten years' adverse possession, the latter would have been compelled to offer proof of the title thus acquired, in order to defeat the action: See, also, *Ward v. Dewey*, 16 N. Y. 519.

6. It thus appears that Sears suffered his estate to fail on account of his inattention to his own affairs. In other words, he slept on his rights until his adversary had acquired the property. Looney owed no duty to Sears. The defendant was paying taxes on his own land, at least for ten years. He in turn owed no duty to Looney to pay the taxes, and his payments after the latter obtained the title were those of a mere volunteer, giving rise to no liability on the part of Looney. They

were antagonists carrying on at arm's-length and entitled to any legitimate advantage gained.

7. The redemption occurred May 9, 1904, and was governed by the statute then in force, embodied in Section 3124, B. & C. Comp. Substantially that enactment gave to anyone the right to redeem property which had been sold for taxes, by paying to the tax collector for the benefit of the holder of the certificate of sale the amount paid at the sale, with interest thereon at the rate mentioned in the certificate, from the date of that document to the date of redemption. The redemptioner was also required to pay all subsequent taxes, assessments, penalties, interest and costs accruing after the certificate and paid by the holder thereof, together with interest. The section declares then that—

“Any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject, however, to the right of the person making the same to be reimbursed by the person benefited.”

As Sears then held the entire estate in the property redeemed, his redemption inured to his own benefit. Section 3125, B. & C. Comp., declares that the redemption “shall operate as a release of all the claims to such tract under or by virtue of the issuance of such certificate of sale.” In other words, the individual acquired no title to the property. His act destroyed the effect of the sale, and no more.

8. The system of sale and redemption of land for taxes above noted was afterwards superseded by the legislation enacted in Chapter 267, Laws 1907. Section 69 of that act requires a suit to remove the cloud of a tax title to be commenced within three years from the date of the sale and that the plaintiff shall deposit with his first pleading the amount of all payments

made by the purchaser, with interest at 15 per cent per annum to be paid to the purchaser if his title fails. The Sears redemption occurred under the old statute which Section 80 of the new statute says must continue in force as to all taxes accruing on or before March 1, 1907. Hence he cannot claim anything in the way of interest or otherwise under the later enactment.

9, 10. Considering that the payments of the taxes made by Sears after redemption were either for his own benefit, as they were during the ten years at least, or were those of a volunteer after that, and, further, that neither party owed any duty to the other, it is not apparent why the plaintiffs should be amerced in any sum, because Sears slept on his rights. Much more is it problematical why we should allow interest on those payments. As pointed out by Mr. Justice HARRIS in *Sargent v. American Bank & Trust Co.*, 80 Or. 16, 46 (156 Pac. 431), the right to recover interest as such must be found in the statute which confers it, and unless it is included it must be deemed to be excluded. The payments by Sears do not come within the purview of the interest statute: Section 6028, L. O. L., as amended by Chapter 358, Laws 1917. Neither is a case presented where interest may be allowed as damages within the meaning of the precedents cited in the *Sargent* case. No damages in favor of Sears could be predicated upon the result of his own negligence and inattention to his own affairs. The case, therefore, stands thus: The Circuit Court awarded Sears a judgment against the plaintiffs and from that part of the decree they have not taken any appeal. They are thus deemed to have been satisfied with the same. The court has given Sears, indeed, a greater measure of relief than he could demand under the law. Equity follows the law and administers relief to the vigilant, but

not to the slothful. We cannot go further than the Circuit Court did in this direction, and must therefore decline to modify our former holding.

The petition is denied.

AFFIRMED. REHEARING DENIED.

Argued November 14, 1919, affirmed January 20, 1920.

ERICKSON v. MARSHFIELD.

(186 Pac. 556.)

Bail—Third Person Furnishing Cash Bail may Recover Against Claim of Forfeit on a Different Charge.

1. In view of Sections 1660, 1663, 1664, 1666, 1668, L. O. L., where plaintiff deposited bail money in recorder's court of the City of Marshfield, incorporated under Sp. Laws 1905, p. 205, which vests recorder with a justice's power, etc., and makes general state laws applicable, the bail being for one accused of maintaining a common nuisance, and took recorder's receipt, showing that money belonged to plaintiff, the money was to be treated as that of accused on that charge; but after its dismissal the money again became property of plaintiff, who, not being *in pari delicto* with accused, could recover it from the city, claiming it as forfeit for accused's failure to answer to a subsequent charge of unlawful sale of liquors, having no continuity with former charge.

Bail—Accused and One Furnishing Cash Bail not in *Pari Delicto*.

2. The city recorder's taking of cash bail from plaintiff for one accused of crime, and the court's releasing of accused, were judicial acts, so that the case was not one of bail being taken by an unauthorized officer; hence plaintiff, seeking to recover bail money after dismissal of the charge, which money the city claimed as forfeited on a different subsequent charge and the accused, were not *in pari delicto*.

From Coos: JOHN S. COKE, Judge.

Department 2.

On September 6, 1917, a complaint was filed in the recorder's court of the City of Marshfield against D. L. Foote, charging him with the offense of "unlawfully keeping and maintaining a place as a common nui-

sance" within the limits of that city. A warrant was issued upon which he was arrested and brought before that court, where his bail was fixed at \$100 cash, which was furnished by the plaintiff, to whom the defendant John W. Butler issued the following receipt:

"Marshfield, September 6th, 1917.

"Received from Andy Erickson One Hundred Dollars Bail for the appearance of D. L. Foote in the Recorder's Court of the City of Marshfield Coos County, Oregon.

"\$100 00/

"(Signed) JOHN W. BUTLER."

As a result Foote was released and later that specific charge against him was dismissed and another was filed against him, wherein it was alleged that he did "wrongfully and unlawfully sell intoxicating liquor to Edmund Smallwood contrary to the provisions of Ordinance No. 787." Foote was tried on the second charge, convicted and sentenced to pay a fine of \$100, and to serve ten days in jail. The court then made an order that the money deposited as bail in the first cause should be retained and used as bail in the second. Foote then escaped from the jurisdiction of the court, was duly called, but failed to appear and the \$100 bail deposited on the first charge was declared forfeited on the second.

There is no proof that the plaintiff was ever consulted about the matter or that he ever agreed that the money which he furnished as bail on the first complaint should be used on the second charge. After a demand for the return of his money and the refusal to pay, the plaintiff brought this action to recover the \$100 evidenced by his receipt.

The defendants contend: First, that when the plaintiff deposited the money as bail for Foote, it then and

thereby became the latter's property and after he was tried and convicted on the second charge they had a right to take the money deposited as bail in the first instance and apply it to the payment of his fine on the second charge; and second, that the issuing of the receipt coupled with the taking of \$100 from Erickson as bail money was an illegal act and for such reason the parties are *in pari delicto* and the plaintiff ought not to recover.

At the trial the defendants filed motions for a judgment of nonsuit and for a directed verdict, which were overruled, and the plaintiff moved for a directed verdict. This last motion was sustained, upon which judgment was entered in favor of the plaintiff, and the defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. J. T. Brand*, City Attorney.

For respondent there was a brief and an oral argument by *Mr. C. F. McKnight*.

JOHNS, J.—The City of Marshfield was incorporated under the provisions of Chapter 251 of the Special Laws of Oregon for 1905. Its recorder is vested "with the powers and jurisdiction of a justice of the peace," the marshal "with the powers of a constable," and each of them in the discharge of his respective duties "shall be subject to all the general laws of the State of Oregon." Section 1660, L. O. L., reads thus:

"The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the court at which he is held to answer, or in which the action is pending or the judgment appealed from is given, the sum of money mentioned in the order; and upon delivering to the officer in whose

custody he is, the clerk's certificate of such deposit, he must be discharged from custody."

Section 1663 provides:

"When money has been deposited in lieu of bail, if it remains on deposit at the time of a judgment for the payment of money, the clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the same must refund the surplus, if any, to the defendant."

By Section 1666 it was enacted:

"If money have been deposited in lieu of bail, and the defendant, at any time before the forfeiture thereof, surrender himself to the officer to whose custody he was committed at the time of making the deposit, in the manner provided in Section 1664, the court or judge thereof must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon reasonable notice of the application to the district attorney."

Section 1668 provides:

"If, without sufficient excuse, the defendant neglect or fail to appear for arraignment, or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered in its journal; and the undertaking of bail or the money deposited in lieu thereof, as the case may be, is thereupon forfeited."

1. In the instant case the bail money was delivered by the plaintiff to the city recorder of Marshfield or the court thereof, and the above receipt was issued by the recorder, showing on its face that it was the plaintiff's money which was deposited as bail for Foote, the defendant then under arrest.

It also appears that the particular charge upon which Foote was arrested and for which the bail money was

deposited was dismissed against him and that thereafter he was arrested upon a different charge, upon which he was later tried, convicted and sentenced to pay a fine of \$100 and serve ten days in jail. In the first case against him he was charged with unlawfully keeping and maintaining a place as a common nuisance, and in the second case he was charged with "wrongfully and unlawfully selling intoxicating liquor." There is no testimony in the record that the one charge grows out of the other or that there is any continuity between them. As contended by the plaintiff, where cash bail is furnished there is a legal presumption, under the authorities, that it is the money of the defendant in the charge, and some courts hold that this presumption is conclusive: *State v. Ross*, 100 Tenn. 303 (46 S. W. 673); *State v. Owens*, 112 Iowa, 403 (84 N. W. 529); *Whittaker v. State*, 31 Okl. 65 (119 Pac. 1003); 6 C. J. 1023. It is also true, as plaintiff insists, that where cash bail is delivered to an officer who has no legal authority to receive it or accept it, the parties are *in pari delicto*, and that the money can thereafter be recovered because it is taken by an illegal act: *Doane v. Dalrymple*, 79 N. J. Law, 200 (74 Atl. 964); 30 Am. & Eng. Ency. 682. But that is not the case here. In this instance the money was not paid to an officer of the court, but was paid to the court itself by the plaintiff, to whom the court issued a receipt showing by whom and for what purpose the cash was advanced.

We find the following in 6 C. J.:

"Where, after giving bail, the prisoner is rearrested or ordered into custody on the same charge or for the same offense, his sureties are discharged, as the only consideration on the undertaking accruing to the sureties is their custody of the principal, and when this con-

sideration fails their liability ceases; nor are they liable where the prisoner escapes after such arrest" (page 1027).

"The bail having been released by the rearrest, nothing short of a new obligation will again bind them, and, although the principal is subsequently released or escapes, or the order committing him to the custody of the sheriff is set aside, the liability of the sureties is not revived" (page 1028).

"The sureties have a right to stand upon the terms of their obligation, and therefore, if the recognizance is to answer an indictment for one offense, the bail are not liable for the failure of their principal to appear and answer to an indictment for an offense of an entirely different character or class, where there is nothing tending to identify the two crimes as one or to show that the one charge had any relation to the other" (page 1029).

As above pointed out, it does not appear that the second charge had its origin in the first offense or grew out of the same transaction.

Under the provisions of the statute above quoted the defendant in the charge, with the approval of the court, may furnish cash bail, and it appears that when so furnished by a third party it shall be deemed and treated as the money of the defendant on the charge. That would be true as between the city of Marshfield and the plaintiff in regard to the first complaint against Foote, so long as that particular charge was pending. But after the first complaint was dismissed the \$100 bail money had answered the purpose for which it was intended and under the facts shown here and as evidenced by the receipt, the money would then revert to the plaintiff and again become his property. The receipt shows, and the testimony is conclusive, that the \$100 was the plaintiff's money when it was given as bail. It was deposited for a specific purpose which

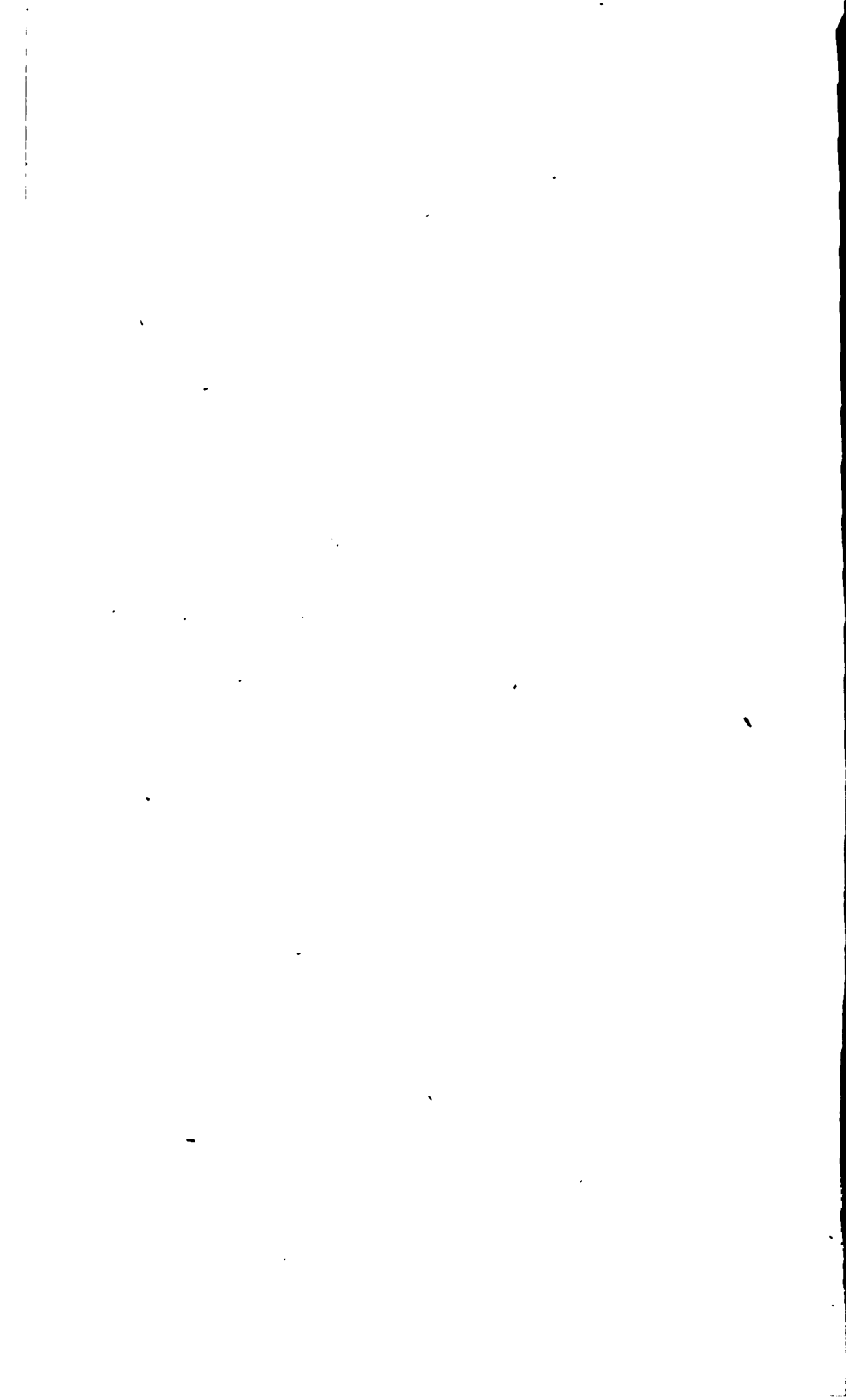
was fully accomplished when the first case against Foote was dismissed.

2. Neither is this a case where an officer of the court without legal authority accepted cash bail and wrongfully released the defendant on the charge. Here the court took the money and then directed the officer of the court to release the defendant. The taking of the cash bail and the enlargement of Foote were judicial acts of the court and the parties were not *in pari delicto*.

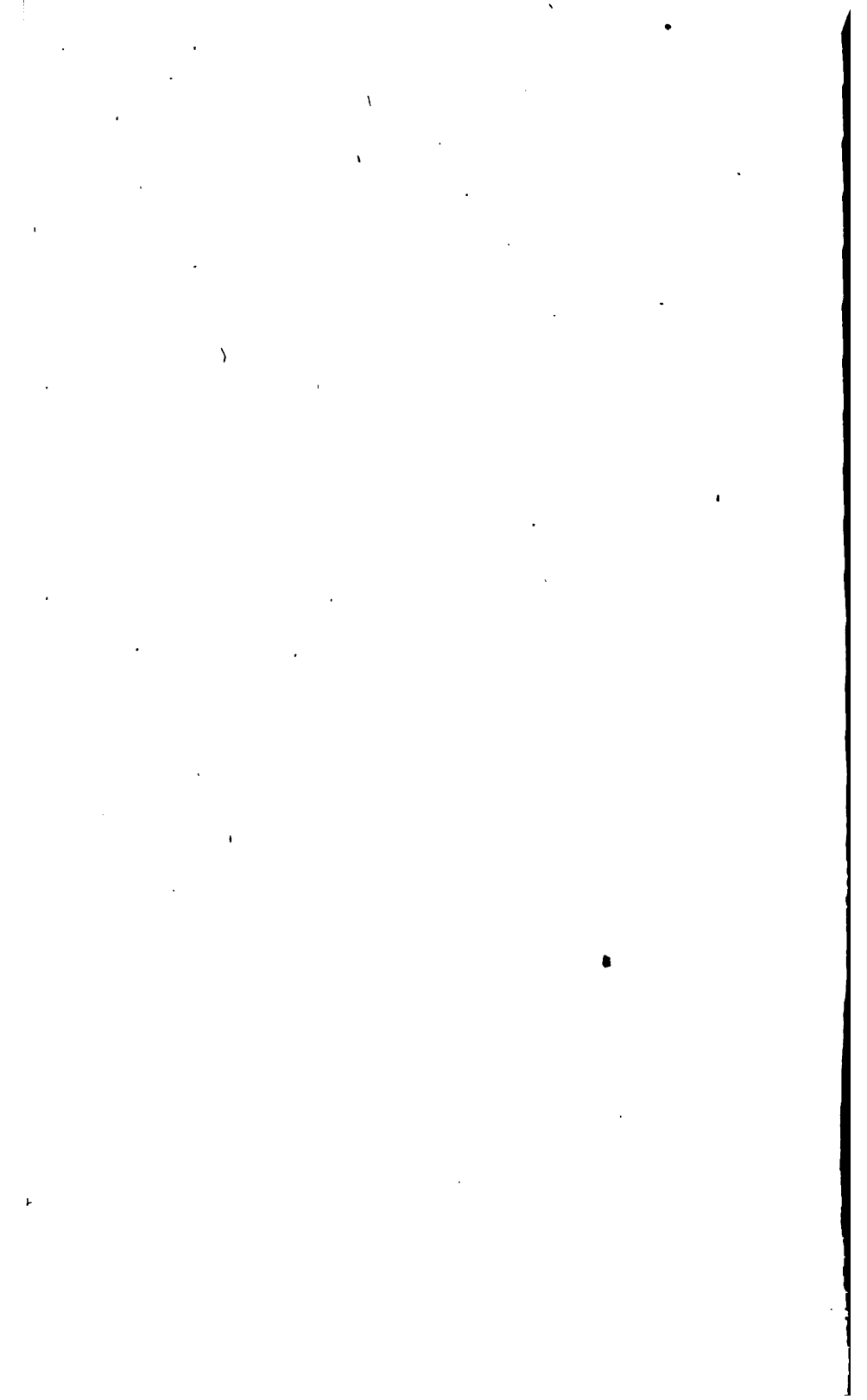
The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.



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1. It is not proper to rest a stated account upon a liquidated demand, already agreed upon and which either party is bound to pay, as, for instance, a promissory note alone, although such an instrument might be included among numerous other items of debit and credit existing between the accounting parties. (Murphy v. Oregon Engraving Co., 534.)

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2. In Oregon the distinction between suits in equity and actions at law is preserved. (Simpson v. First Nat. Bank, 147.)

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Adverse Possession—Amended Complaint Sufficient to Sustain Decree Based on Adverse Possession.

2. In suit to quiet title, amended complaint *held* to have alleged ownership or title by adverse possession and to support decree for plaintiff. (Krueger v. Brooks, 119.)

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3. Adverse possession for the requisite period vests title in the possessor of a tract of land by operation of law. (Krueger v. Brooks, 119.)

Adverse Possession—Title Need not be Perfect.

4. It is not necessary, to make possession adverse, that a party should have a perfect title, or that he should even think he has a perfect title, but, on the contrary, he may know his title is weak and defective. (Looney v. Sears, 690.)

Adverse Possession—Sustained by Evidence.

5. In an action to quiet title, under claim of title by adverse possession, evidence *held* sufficient to sustain a judgment for plaintiffs, although the person under whom plaintiffs claim failed to pay the taxes on the land, and did not return the same on his tax list. (Looney v. Sears, 690.)

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1. Under the treaties of the United States with Austria-Hungary, the Austrian consul-general has authority to direct an attorney to bring an action under the Employers' Liability Act on behalf of a mother who is a subject and resident of Austria for the death of her son. (*Garvin v. Western Cooperage Co.*, 487.)

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APPEAL AND ERROR.**Appeal and Error—Duty of Supreme Court to Announce the Law.**

1. Under Article VII, Section 3, of the Constitution, when some other determination necessarily follows from the conclusion reached, it is the duty of the Supreme Court to announce the law in order to curtail expenses and promote the peace of society. (*Wright v. Wimberly*, 1.)

Appeal and Error—Review of Rulings on Evidence Unnecessary.

2. In purchaser's action against vendor for breach of covenant against encumbrances where tenant, under an outstanding lease, had obtained a judgment against purchaser, it is unnecessary on appeal to determine the question in regard to the introduction of oral evidence as to what was said in relation to the crop at the time of negotiations for the sale. (*Estep v. Bailey*, 59.)

Appeal and Error—Modification of Opinion.

3. In an action to foreclose a mortgage, where it appears that the note, which the mortgage secured was given to cover future advances, the Supreme Court on appeal will consider the action as one for an accounting and dispose of the matter, where it is clear that no evidence other than that before the court could possibly be produced in another formal suit for an accounting. (*Graber v. Boswell*, 70.)

Appeal and Error—Findings of Fact on Conflicting Evidence Conclusive.

4. A verdict in favor of plaintiff settles every contradicted fact in favor of plaintiff, and precludes any examination on appeal as to the weight of testimony. (*Naftzger v. Henneman*, 109.)

Appeal and Error—Sales—Misleading Instructions.

5. In an action for purchase price of onions, an instruction likely to give a jury the impression that a purchaser was not justified in refusing to perform his contract and pay for goods tendered unless they were "entirely different" from those contracted for was misleading and prejudicial (*Naftzger v. Henneman*, 109.)

Appeal and Error—Refusal to Permit Filing of Amended Answer Harmless.

6. Where the answer which had been filed in suit to quiet title permitted defendant to offer all evidence which would have been admissible under any issues raised by a proposed amended answer, refusal to permit defendant to file such answer was harmless to defendant. (*Krueger v. Brooks*, 119.)

Appeal and Error—Remand of Case to Permit Plaintiff to Amend Complaint.

7. Under Section 390, L. O. L., as amended by Laws of 1917, page 126, where plaintiff, who in law action on note sought to compel defendant transferee to indorse note, could so amend complaint as to entitle her to such relief in equity, Supreme Court in sustaining action of lower court in sustaining demurrer to complaint will remand cause with permission to plaintiff to amend complaint. (*Simpson v. First Nat. Bank*, 147.)

Appeal and Error—Presumption of Truth of Facts Stated in Complaint on Demurrer.

8. Supreme Court, in reviewing action of lower court in sustaining demurrer to complaint, will assume that the facts are as stated in complaint. (*Simpson v. First Nat. Bank*, 147.)

Appeal and Error—Review of Weight of Evidence.

9. Under Constitution, Article VII, Section 3, as amended in 1911, the Supreme Court is prohibited from passing upon the comparative weight of the evidence adduced on a trial. (*Joyner v. Crowa Wilamette Paper Co.*, 207.)

Appeal and Error—Determination of Failure of Evidence to Call for Nonsuit.

10. On appeal in action at law, tried by agreement without a jury, the Supreme Court, in reviewing the trial court's denial of defendant's motion for nonsuit, can only inquire whether there is a total failure of evidence on any material issue. (*Oregon Engineering Co. v. West Linn*, 234.)

Appeal and Error—No Review of Finding on Conflicting Evidence.

11. Where there is plenty of evidence to support it, a finding of the trial court, though on conflicting evidence, is conclusive on appeal. (*Oregon Engineering Co. v. West Linn*, 234.)

Appeal and Error—Modification of Judgment to Give Credit.

12. Under Constitution, Article VII, Section 3, as amended in 1910 (see Laws 1911, p. 7), the judgment of the trial court for plaintiff will be modified by deducting therefrom an amount to which

defendant is entitled as a credit for interest on advancements. (Oregon Engineering Co. v. West Linn, 234.)

Appeal and Error—Entry in Court Journal Evidence of Notice of Appeal in Open Court.

13. Under Section 550, L. O. L., as amended by Gen. Laws of 1913, page 617, Section 1, requiring entry in the court journal of notice of appeal, when given in open court, such entry constitutes the only proof admissible of the giving of such notice, being equivalent to the proof or return made upon written notice served in the usual manner. (State v. Bemrose, 305.)

Appeal and Error—Statutory Method to be Strictly Pursued.

14. The right of appeal being statutory, the method prescribed by statute must be strictly pursued. (State v. Bemrose, 305.)

Appeal and Error—Notice of Appeal—Sufficiency.

15. Where two cases were virtually, if not formally, consolidated for trial, a single notice of appeal, describing both decrees, held a sufficient notice for both cases. (First Nat. Bank of Union v. Wegener, 318.)

Appeal and Error—Notice of Appeal—Service.

16. Under Section 550, L. O. L., providing that notice of appeal may be served on adverse party or his attorney, and Section 540, authorizing service by mail where person to be served resides in a different place, a notice of appeal may be served by mail on attorney residing in another county, though parties themselves reside in same place. (First Nat. Bank of Union v. Wegener, 318.)

Appeal and Error—Correcting Judgment in Matter of Interest.

17. Where judgment for plaintiff buyer for breach of contract of sale of hay crop was erroneous only in including interest on the amount from the date of breach up to the day of trial, the Supreme Court, having all the data before it, could make the necessary computation and adjust the matter by modifying the judgment, eliminating the item of interest. (Propst v. William Hanley Co., 397.)

Appeal and Error—Review of Refusal to Grant Nonsuit.

18. Where a motion for nonsuit is interposed and movant thereafter introduces testimony pertaining to the issues, all of the testimony thus submitted will be considered on appeal in reviewing the question of the refusal to grant a nonsuit. (Rae v. Heilig Theater Co., 408.)

Appeal and Error—Conflict in Evidence.

19. Supreme Court will not resolve conflict in evidence. (Rae v. Heilig Theater Co., 408.)

Appeal and Error—Harmless Error in Remarks of Court as to Extent of Proof Required.

20. In an action to recover for goods sold, the trial court's statement, in apprising attorneys of his views of the law, and to explain a ruling, that "proof would not be required to be very extensive," if erroneous as invading the jury's province, held harmless to defendant. (Miller Lum. Co. v. Davis, 507.)

Appeal and Error—Acceptance of Verdict as Conclusive Finding.

21. Where the instructions, if not more favorable to defendant than he could rightfully have demanded, at least were as favorable to him as he could reasonably ask, and there was substantial evidence supporting plaintiff's contention, verdict for plaintiff must be accepted as a conclusive finding that there was an express contract between the parties as alleged in the complaint. (*Miller Lum. Co. v. Davis*, 507.)

Appeal and Error—Correction of Mistake in Judgment as to Interest.

22. Where by inadvertence judgment was made to recite March 1st, instead of November 1st, of a given year as the date from which interest began to run, such mistake in the judgment entry can be corrected in the Supreme Court; defendant judgment debtor admitting that the facts warrant the allowance of interest from November 1st. (*Miller Lum. Co. v. Davis*, 507.)

Appeal and Error—Assignments of Error—Failure to Submit Argument in Brief—Effect.

23. Where appellant fails to present any argument in brief submitted on some of the alleged assignments of error, they will be deemed to have been abandoned or waived. (Citing *Donohoe v. Portland Ry. Co.*, 56 Or. 58, 61 (107 Pac. 964). (*Miller Lum. Co. v. Davis*, 507.)

Appeal and Error—Insufficiency of Complaint to State Cause of Action may be Raised on Appeal.

24. The objection that a complaint does not state a cause of action is never waived, and may be raised for the first time upon appeal, even though a demurrer has been overruled in the trial court with the consent of the parties. (*Almada v. Vandecar*, 515.)

Appeal and Error—Findings Supported by Evidence not Reviewed.

25. Under Article VII, Section 3, of the Constitution, providing that no fact found by a jury shall be otherwise re-examined unless the verdict is unsupported by evidence, etc., a jury's findings cannot be disturbed upon appeal on the theory that they are against the weight of the evidence. (*Pennock v. Sharp*, 520.)

Appeal and Error—Technical Error in Including Interest not Mentioned in Complaint Corrected.

26. The allowance of interest where the complaint did not ask for it constitutes a technical error which will be corrected by modifying the judgment so as to eliminate the interest item. (*Pennock v. Sharp*, 520.)

Appeal and Error—Notice of Appeal—Description of Judgment—Date—Misleading Respondent.

27. Where a notice shows that defendant appeals from a judgment rendered June 28th, and the transcript discloses a judgment entered July 1st, the misdescription was not such as to mislead plaintiff, and defendant could assume that the judgment was rendered on the date of the verdict, as provided by Section 201, L. O. L., and plaintiff was not prejudiced thereby, where he appeared several times to object to the sufficiency of the sureties upon the undertaking. (*Dolph v. Speckart*, 550.)

Appeal and Error—Notice of Appeal—Description of Judgment—Inaccuracy in Amount—Further Appearances of Appellee.

28. Where a notice of appeal states that the judgment was for \$128, when it was for \$128.50, the inaccuracy could not have misled respondent, particularly where his appearances thereafter in the Circuit Court indicated that he was not uncertain as to the judgment appealed from. (*Dolph v. Speckart*, 550.)

Appeal and Error—Notice of Appeal—Negligence.

29. Although a notice of appeal describes the judgment as of an erroneous date, where the affidavit of appellant's counsel shows that the date given in the notice was the same as that in the copy of the proposed judgment served upon him by respondent's counsel, he is thereby relieved from any imputation of carelessness in preparation of notice. (*Dolph v. Speckart*, 550.)

Appeal and Error—Appeal Statutes—Liberal Construction.

30. Substantial compliance with the appeal statutes is all that ought to be required to the end that no one shall be deprived of his right to be heard by reason of any mere technicality arising from strained construction. (*Dolph v. Speckart*, 550.)

Appeal and Error—Findings Supported by Evidence not Disturbed.

31. Under the Constitution, where there is any competent evidence to support a verdict, the Supreme Court is precluded from disturbing the same. (*Dolph v. Speckart*, 550.)

Appeal and Error—Abandoned on Failure to File Transcript or Abstract Within Required Time.

32. On appeal by plaintiff, where it is stated in defendant's brief that he has appealed, but where there is no copy of notice of appeal, or undertaking on appeal, or abstract in his favor, court will conclude that defendant abandoned appeal by failure to file transcript or abstract in appellate court within 30 days after perfection of appeal, under Laws of 1913, Chapter 320. (*Crumbley v. Crumbley*, 617.)

See Criminal Law, 6, 7, 8.

See Divorce, 8, 13-15, 17, 19, 20.

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See Waters and Watercourses, 4.

ARREST.

See Homicide, 2.

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See Municipal Corporations, 1-8.

ASSIGNMENTS OF ERROR.

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ATTORNEY AND CLIENT.**Attorney and Client—Amount of Damages for Breach of Contract of Employment Question for Jury.**

1. In an action by an attorney for breach of a contract of employment under which his compensation was to be a certain percentage of the amount recovered, defendant having employed other counsel, who brought an action, wherein it was stipulated that defendant was at least entitled to certain stock which was deposited in the registry of the court, whether defendant accepted such stock as her property so as to entitle plaintiff to compensation *held* for the jury, although the stock remained in the registry of the court. (*Dolph v. Speckart*, 550.)

Attorney and Client—Breach of Contract by Client—Amount of Compensation.

2. Where a client breached a contract under which he employed an attorney to obtain or recover part of the estate of a decedent claimed by the client, and employed other counsel, who brought an action wherein it was stipulated that the client was at least entitled to certain corporate stock, which was then given to the client, damages for breach of the contract with the attorney should be based on the value of the corporate stock at the time it was issued or given to the client. (*Dolph v. Speckart*, 550.)

Attorney and Client—Measure of Damages for Breach of Contract of Employment.

3. Where one employs an attorney and makes an express valid contract, stipulating for the compensation which the attorney is to receive for his services, such contract is, generally speaking, conclusive as to the amount of such compensation. (*Dolph v. Speckart*, 550.)

Attorney and Client—Right of Client to Terminate Relationship cannot Defeat Claim for Compensation.

4. While a client may terminate the relationship between himself and his attorney, where an attorney is prematurely discharged or is otherwise wrongfully prevented from performing the professional duties for which he was employed without fault on his part, he is entitled to compensation, even though the arrangement was for a contingent fee, provided the contingency has happened. (*Dolph v. Speckart*, 550.)

Attorney and Client—Measure of Damages for Breach of Contract of Employment.

5. A client, by wrongfully preventing the performance of acts which entitle an attorney to specific compensation under a contract, becomes liable in damages in such amount. (*Dolph v. Speckart*, 550.)

See Homicide, 1.

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BAIL.

Bail—Third Person Furnishing Cash Bail may Recover Against Claim of Forfeit on a Different Charge.

1. In view of Sections 1660, 1663, 1664, 1666, 1668, L. O. L., where plaintiff deposited bail money in recorder's court of the City of Marshfield, incorporated under Sp. Laws 1905, p. 205, which vests recorder with a justice's power, etc., and makes general state laws applicable, the bail being for one accused of maintaining a common nuisance, and took recorder's receipt, showing that money belonged to plaintiff, the money was to be treated as that of accused on that charge; but after its dismissal the money again became property of plaintiff, who, not being *in pari delicto* with accused, could recover it from the city, claiming it as forfeit for accused's failure to answer to a subsequent charge of unlawful sale of liquors, having no continuity with former charge. (*Erickson v. Marshfield*, 705.)

Bail—Accused and One Furnishing Cash Bail not in *Pari Delicto*.

2. The city recorder's taking of cash bail from plaintiff for one accused of crime, and the court's releasing of accused, were judicial acts, so that the case was not one of bail being taken by an unauthorized officer; hence plaintiff, seeking to recover bail money after dismissal of the charge, which money the city claimed as forfeited on a different subsequent charge and the accused, were not *in pari delicto*. (*Erickson v. Marshfield*, 705.)

BANKRUPTCY.

Bankruptcy—Testimony of Bankrupt Used Against Him in Criminal Prosecution.

1. Bankruptcy Act of 1898, Section 7 (U. S. Comp. Stats., Section 9591), providing that no testimony given by bankrupt shall be offered against him in any criminal proceeding, does not apply to the language and acts of a bankrupt who in the course of his examina-

tion upon the witness-stand commits a fresh crime, such as perjury or the uttering of a forged instrument. (*State v. Frasier*, 90.)

Bankruptcy—Trustee as Against Chattel Mortgagee Under Unfiled Mortgage Stands in Position of Attaching Creditor.

2. Under Bankruptcy Act as amended in 1910 (U. S. Comp. Stat., § 9631), a trustee in bankruptcy, as against the rights of a chattel mortgagee under an unfiled chattel mortgage, stands in the position of an attaching creditor, and his rights are determined as of the date the petition in bankruptcy was filed. (*First Nat. Bank of Union v. Wegener*, 318.)

Bankruptcy—Chattel Mortgage, Recorded as Bill of Sale Against Trustee in Bankruptcy, Valid Pending Foreclosure.

3. Where instrument in form of bill of sale, but in substance a chattel mortgage, was filed and recorded as bill of sale at the time of the filing of bankruptcy proceedings against mortgagor, and mortgagee at time thereof had possession of the property covered by the mortgage, and action was then pending by mortgagee to foreclose the mortgage, the mortgage lien was good as against trustee in bankruptcy, though the instrument was recorded as a bill of sale instead of as a chattel mortgage. (*First Nat. Bank of Union v. Wegener*, 318.)

Bankruptcy—Notice to Trustee in Bankruptcy of Chattel Mortgage on Bankrupt's Property Sufficient.

4. Where at the time of the filing of bankruptcy proceedings against mortgagor, an action to foreclose labor liens against the lumber covered by the mortgage was pending, wherein an affidavit had been filed referring to chattel mortgage on the property, and where the bankrupt's petition referred to such mortgage, the trustee in bankruptcy upon adjudication of bankruptcy had legal notice of such mortgage, though it was not of record. (*First Nat. Bank of Union v. Wegener*, 318.)

BANKS AND BANKING.

Banks and Banking—Liability of Bank in Making Loans of Depositor's Money.

1. If a bank is authorized by a depositor to loan the latter's money, the bank for that purpose acts as an agent; and, if it lends the money in good faith and uses due diligence, it is not ordinarily liable for any losses that occur. (*Simpson v. First Nat. Bank*, 147.)

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Foreclosure as Bar to Action for Deficiency.

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BILL OF SALE.

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BILLS AND NOTES.**Bills and Notes—Pleading in Action Against Bank as Alleged Indorser.**

1. Action against bank to recover balance on bankrupt's note, in which note, prior to maker's bankruptcy, the bank, as agent for plaintiff, had invested her money, and which note had been delivered by bank to plaintiff without indorsement and with payee's name left blank, the complaint, averring that "plaintiff is entitled to the indorsement of defendant * * upon said note," and that the bank, on account of its negotiation and sale of the note to plaintiff, was liable as indorser, *held* to state a claim based on the note and not upon any independent oral promise of guaranty or express warranty. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Transfer of Note With Blank Space for Payee's Name.

2. Under the law-merchant, when maker left a blank for name of payee and delivered the instrument in that condition to another person for value, the person to whom it was delivered, or any subsequent holder, could insert his own name or that of a transferee as payee. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Prima Facie Authority to Fill in Blank Space.

3. Where maker gave bank a note leaving blank space for name of payee, and bank, without filling in blank space, transferred note to depositor whose money it had been authorized to loan out, depositor was a "person in possession" within Section 5847, L. O. L., giving "person in possession" *prima facie* authority to fill in blank, and had *prima facie* authority to fill blank by writing her own name or that of the bank. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Filling in Name of Payee in Blank Space.

4. Where maker gave bank a note leaving blank space for name of payee, with authority to bank to insert its own name, and bank, without filling in blank, transferred note to depositor, depositor's authority to fill in blank, under Section 5847, L. O. L., was limited to inserting name of bank, since the blank space under the statute must be filled in "strictly in accordance with the authority given." (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Compelling Indorsement of Note Transferred by Delivery.

5. Under Section 5882, L. O. L., and even in absence thereof, payee who transfers note for value without indorsing it can be compelled by transferee to indorse note. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Rights of Transferee.

6. Under Section 5882, L. O. L., transferee of note is vested not only with the equitable, but also with the legal, title although he cannot, until indorsement, be treated as a holder in due course. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Transferee's Right to Unqualified Indorsement.

7. Section 5882, L. O. L., giving transferee the right to indorsement of transferor, entitles transferee to an unqualified indorse-

ment unless the parties agreed that the indorsement should be qualified. (Simpson v. First Nat. Bank, 147.)

Bills and Notes—Presentment—Sufficiency of Evidence.

8. Conflicting evidence held to make a jury question whether note sued upon was in a bank's possession for presentment on day note fell due, as required by Section 5904, L. O. L., or in plaintiff's lock box in bank. (Nickell v. Bradshaw, 580.)

Bills and Notes—Presentment—Sufficiency.

9. Under Sections 5905, 5920, L. O. L., relating to presentment of negotiable instruments for payment, a note payable at a bank is sufficiently presented if it is in bank at date of maturity ready to be delivered by bank to the proper person upon payment being made. (Nickell v. Bradshaw, 580.)

Bills and Notes—Payment—Authority.

10. Possession at time and place of payment of a note properly indorsed is *prima facie* evidence of authority to receive payment. (Nickell v. Bradshaw, 580.)

Bills and Notes—Negotiability—Time for Payment.

11. Under Sections 5834, 5837, L. O. L., defining negotiable instruments, etc., a note payable five years from date and containing the clause, "due if ranch is sold or mortgaged," is not rendered non-negotiable by quoted words. (Nickell v. Bradshaw, 580.)

Bills and Notes—Time for Payment—Construction.

12. Where a note payable five years from date contains the clause, "due if ranch is sold or mortgaged," the quoted clause is not self-executing, but merely confers option upon holder to treat debt as due if contingency occurs. (Nickell v. Bradshaw, 580.)

Bills and Notes—Complaint—Time for Payment.

13. Where a note payable five years after date contained a clause making it due if the maker's ranch was sold or mortgaged, a plaintiff relying upon expiration of five-year period need not allege or prove that ranch had not been sold. (Nickell v. Bradshaw, 580.)

Bills and Notes—Burden of Proof—Notice of Dishonor.

14. The holder of a note has burden of proving that notice of dishonor was mailed within the time prescribed by Section 5937, L. O. L. (Nickell v. Bradshaw, 580.)

Bills and Notes—Notice of Dishonor—Sufficiency of Evidence.

15. Evidence that written notice of dishonor was postmarked during afternoon of following day does not establish a compliance with Section 5937, L. O. L., requiring deposit in postoffice in time to go by mail on day following day of dishonor, etc., since there is no proof regarding time of outgoing mails. (Nickell v. Bradshaw, 580.)

Note Transferred Unindorsed With Blank for Payee's Name.

See Equity, 2.

Note Signed by Wife not Joint Obligation of Husband and Wife.

See Husband and Wife, 5.

BREACH OF CONTRACT.

See Attorney and Client, 1-5.
See Interest, 1.
See Sales, 10.

BREACH OF COVENANT.

See Covenants, 2, 3, 5.

BROKERS.

Brokers—Landlord and Tenant—Abandonment of Lease—Equity from Void Agreement to Act as Broker.

1. Where defendant, tenant, abandoned the lease, plaintiffs, landlords, were restored to their own, independent of any relation of tenant, and no equity can arise from an oral agreement for the tenant to act for the sale of such property, void under Section 808, L. O. L., especially where defendant fails to show any assent or adoption by plaintiff of his acts in attempting to sell the land. (*Shaw v. Corbett*, 270.)

Brokers—"Real Estate Broker" Defined.

2. A "real estate broker" is one employed in negotiating the sale, purchase, or exchange of lands on a commission contingent on success. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Brokers—Right to Commission on Refusal of Principal to Sell.

3. A realty broker, employed to sell given lands or to find a purchaser ready, able and willing to buy, is entitled to commission when he introduces to his principal a person ready, able and willing to purchase on the terms fixed by the principal, even though the latter refuses to sell. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Brokers—Construction of Contract to Pay Commission on "Consummation of Deal."

4. In view of a stipulation that plaintiff broker's commission should be so much "of the price," engagement by the owner to pay commission if the broker found a buyer ready and willing to "consummate a deal" for the stipulated price held to be to pay commission on actual completion and carrying out of a contract of exchange of properties with a buyer procured by the broker. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Personal Contract by Broker to Procure Insurance.

See Insurance, 1.

Contract of Brokers Without Authority to Act.

See Insurance, 4.

Broker's Oral Agreement for Sale of Real Estate.

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CARRIERS.**Shipment by Common Carrier.**

See Commerce, 1.

CHARTER OF CITIES.**EUGENE.**

See Gamma Alpha Bldg. Assn. v. Eugene, 80.

PORTLAND.

See Portland v. Kitchen, 418.

See Portland v. Traynor, 418.

CHattel MORTGAGES.**Chattel Mortgages—Right of Possession in Mortgagor Until Breach of Conditions.**

1. Under a chattel mortgage the right of possession remains in mortgagor until there is a breach of the conditions after which the mortgagee has the qualified title giving him possession. (First Nat. Bank of Union v. Wegener, 318.)

Chattel Mortgages—Bill of Sale in Substance Chattel Mortgage.

2. An instrument in form of bill of sale, providing that upon compliance with certain conditions by seller the sale should become null and void, *held*, in substance, a chattel mortgage. (First Nat. Bank of Union v. Wegener, 318.)

Chattel Mortgages—Valid as Between Mortgagor and Mortgagee Though not Recorded.

3. A chattel mortgage is valid as between the parties, though not of record. (First Nat. Bank of Union v. Wegener, 318.)

Chattel Mortgages—No Attorney's Fees Allowed on Foreclosure.

4. In foreclosing chattel mortgage no attorney's fees should have been allowed, where there was no provision for payment thereof in either note or mortgage. (First Nat. Bank of Union v. Wegener, 318.)

See Bankruptcy, 2-4.

CHILDREN.**Custody of Children.**

See Divorce, 1-7.

Trial Judge to Determine Competency of Children as Witnesses.

See Witnesses, 3.

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See Municipal Corporations.

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See Charter of Cities.

CLASS LEGISLATION.

See Constitutional Law, 1.

COMMERCE.

Commerce—Inspection—Legislature can Require Inspection of Hides as Condition for Shipment by Common Carrier.

1. To detect and prevent stealing of livestock, the legislature may enact a law for the inspection of hides as a condition of their shipment within or without the state by a common carrier. (State ex rel. v. Hines, 607.)

COMMISSION.

Right to Commission on Refusal of Principal to Sell.

See Brokers, 3, 4.

CONCLUSIONS OF LAW.

See Pleading, 13, 14.

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See Appeal and Error, 4.

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CONSIDERATION.

See Contracts, 1, 2, 4.

See Evidence, 2.

See Fraudulent Conveyances, 1.

See Logs and Logging, 2.

CONSTITUTIONAL LAW.

Constitutional Law—Statute Protecting All Members of Class not Class Legislation.

1. Legislation which protects alike all the members of a class that are or may be affected thereby is not obnoxious to Article I, Section 20, of the Constitution. (Wright v. Wimberly, 1.)

Constitutional Law—Waters and Watercourses—Council's Legislative Act in Forfeiting Franchise Contract Binding upon Court—Obligation of Contracts.

2. Where a franchise ordinance conferred express authority upon a city council to revoke the franchise when in its judgment it had been breached, the findings upon which it must be concluded that council acted in passing the ordinance annulling and revoking the franchise ordinance are binding on the court, and the court would impair the obligation of the contract if it disregarded council's action. (Newsom v. City of Rainier, 199.)

Constitutional Law—Constitutionality of Statute may be Determined by Mandamus.

3. The constitutionality of an act may be tested in an original mandamus proceeding. (State ex rel. v. Hines, 607.)

Constitutional Law—Statute Providing for Its Taking Effect upon Request of Stock Raisers' Association Invalid as Delegation of Power.

4. Laws of 1919, page 732, Section 3, making it unlawful to transport hides by common carrier without inspection and suspending the operation of the law in Multnomah County so long as a state brand and livestock inspector appointed by the Governor under Laws of 1915, page 43, Section 16, providing for such appointment upon request of the Cattle and Horse Raisers' Association, is maintained therein, is unconstitutional as a delegation of legislative power to such association, in view of Article IV, Section I, of the Constitution, prohibiting delegation of legislative authority and Article I, Section 21, prohibiting laws taking effect upon any authority except as provided by the Constitution. (State ex rel. v. Hines, 607.)

See States, 1.

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CONSUL.

Action Properly Brought by Direction of Foreign Consul.

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CONTRACTS.

Contracts—Seal as Presumptive Evidence of Consideration.

1. By Section 776, L. O. L., the seal on a bill of sale was primary evidence of consideration. (Wilson v. Prettyman, 275.)

Contracts—Pleading Failure of Consideration.

2. Total failure of consideration for an agreement, and the facts constituting such failure, must be pleaded, or evidence thereof cannot be considered. (Wilson v. Prettyman, 275.)

Contracts—Modification of Written Agreement by Subsequent Parol Contract.

3. A written agreement may be modified by a subsequent parol contract, notwithstanding the general rule embodied in Section 713, L. O. L. (Propst v. William Hanley Co., 397.)

Contracts—Consideration Necessary to Contract if Waiver.

4. Waiver may be the subject of contract, for which a consideration is requisite, the same as in any other contract. (Propst v. William Hanley Co., 397.)

Contracts—Construction to Give Effect to Entire Contract.

5. Written contracts should be construed from the standpoint of the parties when they were contracting, and be so interpreted as to give effect to all the provisions, if possible. (Dolph v. Speckart, 550.)

See Appeal and Error, 21.

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Clause Prohibiting Assignment of Contract.

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Waiver of Provisions Against Assignment.

See Vendor and Purchaser, 2, 3, 5.

CORPORATIONS.**Corporations—Authority of Officers and Agents Governed by General Law of Agency.**

1. The power of officers and agents of corporation to bind the corporation is governed by the general law of agency, the underlying principles being the same, and their authority may be implied from their conduct and the acquiescence of the directors. (*Rae v. Heilig Theater Co.*, 408.)

Corporations—Ratification of Contract by Its Agent.

2. Corporation, having approved auditor's contract with public accountant for services to be rendered corporation and having accepted the benefits of such contract, cannot avoid liability for such services. (*Rae v. Heilig Theater Co.*, 408.)

Corporations—Implied Authority of Officers and Agents.

3. When in the usual course of the business of a corporation an officer or agent has been allowed to manage certain of its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business; the usual employment being evidence of his powers. (*Rae v. Heilig Theater Co.*, 408.)

Corporations—Authority of Agent.

4. The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purpose of the agency, and other persons are invited to deal with the agent with that understanding. (*Rae v. Heilig Theater Co.*, 408.)

Corporations—Authority of Agent to Make Contract for Services Jury Question.

5. In action by public accountant against corporation for services rendered upon employment by corporation's agent, where defense was that agent who had employed accountant was not the authorized agent of the corporation, and where corporation, at close of plaintiff's testimony, moved for nonsuit, *held*, that there was competent evidence tending to support findings of fact that agent was the authorized agent of corporation. (*Rae v. Heilig Theater Co.*, 408.)

COSTS.**Costs—On Verdict in His Favor, Defendant Entitled to Costs and Disbursements.**

1. Where verdict was adverse to plaintiff, defendant was entitled to judgment for costs and disbursements. (*Hurst v. Larson*, 211.)

Costs—Judgment for Costs Without Service of Bill.

2. A justice of the peace could render judgment for costs and disbursements without the costs bill having been served. (*Goynes v. Tracy*, 216.)

Costs—Modification of Judgment Sufficient to Carry Costs to Appellant.

3. The Supreme Court's modification of judgment for plaintiff buyer for breach of contract for sale of hay crop, by eliminating the item of \$148.33 interest on the amount from time of breach up to day of trial, was sufficient to carry costs in favor of defendant in the Supreme Court. (*Propst v. William Hanley Co.*, 397.)

Costs—Modification of Judgment on Appeal.

4. Where by inadvertence the judgment entry recited March 1st, instead of November 1st, of a given year as the date from which interest began to run, modification of the judgment entry to correct it does not entitle defendant judgment debtor as a matter of right to his costs and disbursements on appeal. (*Miller Lum. Co. v. Davis*, 507.)

City Entitled to Costs in Prosecution for Violation of Ordinance.

See *Municipal Corporations*, 16.

COURTS.**Courts—Rules of Decision.**

1. Opinion of court must be read in the light of the facts discussed by the court. (*Simpson v. First Nat. Bank*, 147.)

Courts—Action for Destruction of Fish-trap Maintainable in State Other Than Where Located.

2. Where no part of a fish-trap was driven into the earth, except piling, all of which was driven by the owner with the intention of removing at the end of the season, the trap was "personal property," and an action against the owners of a tugboat for its destruction was transitory, and could be maintained in a state other than where the trap was located. (*Anderson v. Columbia Contract Co.*, 171.)

Courts—Rule of Stare Decisis Applies With Peculiar Force to Decisions on Constitutional Questions.

3. The rule of *stare decisis* applies with peculiar force to the decision of courts on question of constitutional law, and a particular construction of a constitutional provision having been adopted, it will be recognized and enforced subsequently. (*State v. Olcott*, 633.)

Courts—Trove for Conversion of Mill Machinery is Transitory.

4. An action to recover for the conversion of mill machinery by taking it from the mill site is not an action for damages to the land, but is transitory, and may be maintained in a state other than that in which the site is located. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Act of Council in Forfeiting Contract Binding upon Court.

See *Constitutional Law*, 2.

Jurisdiction of State Court.

See *Criminal Law*, 4.

Power of Circuit Court to Direct the Justice of the Peace.

See Justice of the Peace, 4.

COVENANTS.**Covenants—Conclusiveness of Judgment After Notice to Covenantor.**

1. Where action on covenant against encumbrances was brought by grantee to recover amount of judgment he had been compelled to pay in action by owner of outstanding lease, of which action defendant grantors had been notified, and also to recover \$50 attorney's fees in the former action, the reasonableness of such fees not having been questioned in the former action, there was no necessity of submitting that part of the case to the jury; defendants' contention being that they were not liable therefor. (*Estep v. Bailey*, 59.)

Covenants—Outstanding Lease as Breach of Covenant Against "Encumbrances."

2. The existence of a valid lease to another at the date of the warrantors' deed was a breach of their covenant against encumbrances, an "encumbrance" being a burden on the land which depreciates its value, as a lien, easement, or servitude. (*Estep v. Bailey*, 59.)

Covenants—Measure of Damages for Breach of Covenant Against Encumbrances.

3. Generally the measure of damages for breach of a covenant against encumbrances by reason of an outstanding lease is the value of the use of the premises during the remainder of the life of the lease. (*Estep v. Bailey*, 59.)

Covenants—Recovery of Expenses Incurred in Defending Title.

4. Grantee in a warranty deed is entitled to expenses incurred in defending title against the claim of a third party. (*Estep v. Bailey*, 59.)

Covenants—Damages from Breach of Covenant Against Encumbrances.

5. Where, at time of conveyance with covenant against encumbrances, there was an outstanding lease, the tenant under which had planted a crop, which the grantee thereafter harvested and sold, the grantee could recover from the grantors the amount of the judgment and costs secured against her in an action, of which warrantors were notified, by the tenant for the value of the crop so sold by the grantee. (*Estep v. Bailey*, 59.)

Covenants—Conclusiveness of Judgment After Notice to Covenantor.

6. Grantee having notified defendant warrantors to defend an action brought by tenant under outstanding lease against grantee for conversion of crops not reserved in the deed, the vendors are bound by the judgment in that case to the same extent as though they had been parties to the record, and such judgment is conclusive upon them as to the existence and validity of the tenant's outstanding lease from the former owner, and as to the amount grantee was compelled to pay tenant in tenant's action for conver-

sion of crops growing on the land at date of purchase. (*Estep v. Bailey*, 59.)

Covenants—Liability to Covenantee for Attorney's Fees.

7. Where grantee in warranty deed was obliged to incur the expense of \$50 for attorney's fees in defending an action, of which her warrantor was notified, by tenant under a lease outstanding at the time of conveyance, for conversion by grantee of such tenant's crop then on the land she could recover for such expense from her warrantor. (*Estep v. Bailey*, 59.)

See Crops, 1.

CREDITORS.

See Trusts, 4.

CRIMINAL LAW.

Criminal Law—Jurisdiction.

1. Where a court has jurisdiction of a crime a statute simply conferring same jurisdiction on another court does not deprive former of its jurisdiction, in absence of an express provision or clear implication to that effect, but merely confers concurrent jurisdiction. (*State v. Frasier*, 90.)

Criminal Law—Federal Jurisdiction.

2. The criminal jurisdiction of federal courts is confined to crimes under federal statutes except as to common-law offenses committed on the high seas, or in places or districts within the states which have been ceded to the United States, and which, when the crime was committed, were under the exclusive jurisdiction of the United States. (*State v. Frasier*, 90.)

Criminal Law—Jurisdiction—Offenses Against State and United States.

3. Offenses which are directed against the sovereignty of the state or which affect its population are within the jurisdiction of the state courts, although such offenses may also be directed against the sovereignty of the federal government, and may be thus within the jurisdiction of both the federal and the state courts. (*State v. Frasier*, 90.)

Criminal Law—Jurisdiction of State Court—Forgery.

4. Where the uttering of a forged receipt constituted forgery under the laws of the state, the jurisdiction of the state court is not ousted by the fact that the same acts, consisting of uttering and publishing a forged instrument to a referee in bankruptcy appointed by the federal court, are also an offense under the laws of the United States. (*State v. Frasier*, 90.)

Criminal Law—Weight of Evidence—Review.

5. It is not the province of the Supreme Court on appeal in a criminal case to consider the weight of the evidence. (*State v. Frasier*, 90.)

Criminal Law—Orders Appealable—Motion for New Trial.

6. General Laws of 1915, page 96, amending Section 548, L. O. L., so as to allow an appeal from an order setting aside a judgment and

granting a new trial, does not apply to criminal actions. (State v. Frasier, 90.)

Criminal Law—Appeal—Exceptions.

7. In a prosecution for uttering a forged receipt, accused cannot complain that account-books, exhibits in the case, were removed from courtroom during argument, where it appeared that they were returned, and an offer made by counsel for the state to have them sent to the jury while they were deliberating, but, objection being made by defendant's counsel, they were not so disposed of; no exception having been taken in regard to the matter nor any ruling having been made. (State v. Frasier, 90.)

Criminal Law—Appeal—Extension of Time to Prepare Bill of Exceptions.

8. An order extending the time for defendants in an arson case to prepare and lodge a bill of exceptions does not extend the time for filing the transcript on appeal. (State v. White, 205.)

Criminal Law—Failure to Try Accused at First Term of Court.

9. A defendant who was not brought to trial at the next term after filing of the indictment, unless the postponement was upon his application or by his consent, is entitled to have the indictment dismissed as of course, unless good cause is shown by the state, under Section 1701, L. O. L. (State v. Bateham, 524.)

Criminal Law—Accumulation of Cases "Good Cause" for Postponement of Prosecution.

10. Accumulation of undetermined cases may be sufficient to prevent the discharge of an accused under Section 1701, L. O. L., where he is not brought to trial at the next term of court after the filing of the indictment, such an accumulation, where it prevents the case of an accused being reached for trial, being "good cause" for postponement within the meaning of such statute. (State v. Bateham, 524.)

Criminal Law—Discretion of Court as to Postponement.

11. Whether the state has shown "good cause" for having failed to try an accused at the next term of court following filing of an indictment as required by Section 1701, L. O. L., rests largely in the discretion of the trial court. (State v. Bateham, 524.)

Criminal Law—Review of Decision Concerning Capability of Child Witness.

12. A decision of the trial court as to whether or not proffered witnesses under 10 years of age are incapable of receiving just impressions of the facts respecting which they are examined under Section 732, L. O. L., is a decision of a preliminary question of fact which cannot be disturbed on appeal, if there is any evidence in the record to support it. (State v. Bateham, 524.)

Criminal Law—Evidence to Show Other Crimes Inadmissible.

13. It is prejudicial error to admit evidence tending to show accused guilty of any crime other than that charged in the indictment. (State v. Bateham, 524.)

Criminal Law—Witnesses—Cross-examination of Character Witnesses.

14. Although a defendant who tenders his supposed good character in evidence thereby invites scrutiny and disclosure of specific generic instances of his misconduct that may incidentally impute to him guilt of other crimes, it would be reversible error for the state to ask questions on cross-examination of character witnesses solely for the purpose of intimating to the jury that the defendant was guilty on other charges of like nature, which the state's attorney could not prove directly and which had no foundation within his knowledge or information. (State v. Bateham, 524.)

Criminal Law—Child not an "Accomplice."

15. To be an "accomplice" one must be of sufficient intelligence and understanding knowingly to enter into and help carry out a plan for the commission of the crime, and must actually participate, and a little girl who is a victim rather than a participant is not an accomplice of one prosecuted for sodomy. (State v. Bateham, 524.)

Criminal Law—Reasonable Doubt—Character Evidence may be Considered.

16. The jury must consider all the testimony, that about character as well as all other, and if, taken all together, there remains a reasonable doubt of the defendant's guilt, he is entitled to acquittal. (State v. Bateham, 524.)

Criminal Law—Instructions as to Reasonable Doubt.

17. If a jury bases reasonable doubt on testimony about good character of the accused, the resulting acquittal is legitimate; but the court has no right to instruct the jury that such testimony is sufficient for that purpose, as such an instruction would be an invasion of the province of the jury, in view of Section 139, L. O. L. (State v. Bateham, 524.)

Criminal Law—Credibility of Evidence is for Jury.

18. In a criminal prosecution, the weight of the evidence and the credibility of the witnesses are questions solely for the jury, and the appellate court will not be moved by defendant's contention against the probability of the truth of the testimony against him. (State v. Bateham, 524.)

See Witnesses, 4.

CROPS.

Crops—Covenants—Right to Growing Crops on Failure to Reserve in Deed.

1. As between vendors and purchaser a deed to the property upon which a crop is growing conveys to the purchaser the growing crop as a part of the real property, unless the same is reserved by the vendors in the deed, and this is true even if the purchaser knew that there was an outstanding lease upon a portion of the premises at the time of purchase. (Estep v. Bailey, 59.)

Right of Tenant to Crops as Against Landlord and His Grantee.

See Landlord and Tenant, 1.

CROSS-EXAMINATION.**Question Establishing Defense not Proper Cross-examination.**

See Witnesses, 1.

Cross-examination of Character Witnesses.

See Criminal Law, 14.

See Witnesses, 4.

CUSTODY OF CHILDREN.

See Divorce, 1-7.

CUSTOMS AND USAGES.**Customs and Usages—Not Admissible to Add to or Contradict Contract.**

1. Under Section 727, subdivision 12, L. O. L., evidence of usage is admissible only as a means of interpreting act, contract or instrument, where true character thereof is not otherwise plain, and is not admissible to add new terms or stipulations to contract or contradict explicit terms thereof. (Hurst v. Larson, 211.)

Customs and Usages—As to Duty of Buyer of Potatoes to Furnish Car.

2. Where contract for sale of potatoes did not specify who was to furnish the means of transportation, evidence of a custom requiring buyer of less than a carload of potatoes to furnish car was admissible under Section 727, subdivision 12, L. O. L. (Hurst v. Larson, 211.)

Customs and Usages—Incorporation of General Custom in Written Contract Unnecessary.

3. A general custom known to both contracting parties respecting the subject matter of their stipulation is in a certain sense a law covering them, so that it is not necessary to mention it in writing. (Hurst v. Larson, 211.)

DAMAGES.**Damages—Evidence of Daily Catch Admissible in Action for Destruction of Fish-trap.**

1. In an action against the owner of a tugboat for destruction of plaintiff's fish-trap, although such trap may not have "rental value," in the usual sense of the term, yet it has a usable value, which plaintiff would be entitled to recover, and evidence as to the amount of the fish catch just prior to injury or destruction and just after repair, together with evidence of the catch of other near-by traps between such times, was competent evidence, not for the purpose of measuring the compensation, but for estimating the usable or rental value. (Anderson v. Columbia Contract Co., 171.)

Damages—Taxation—Record Owner of Land in Adverse Possession of Another is not Entitled to Interest on Taxes Paid.

2. Payments of taxes on land in the adverse possession of another by the record owner who had redeemed from a tax sale were not within the interest statute (Section 6028, L. O. L., as amended by Laws 1917, p. 781), nor was interest recoverable as damages. (Looney v. Sears, 690.)

See Attorney and Client, 1-5.

See Landlord and Tenant, 3.

Proper Measure of Damages for Son's Death.

See Death, 2.

DEATH.**Death—Nonresident Alien may Sue Employer for Death of Son.**

1. A nonresident alien may maintain an action, under the Employers' Liability Act, for the death of her son against his employer. (*Garvin v. Western Cooperage Co.*, 487.)

Death—Proper Measure of Damages for Son's Death.

2. In a mother's action under the Employers' Liability Act for the death of her son, an instruction that the jury might consider his age, life expectancy, health, ability, habits, mental and physical skill, and the amount which he would probably have saved from his earnings, *held* proper. (*Garvin v. Western Cooperage Co.*, 487.)

Action for, Properly Brought by Direction of Foreign Consul.

See Aliens, 1.

DECLARATION.**Declaration of Deceased Person.**

See Evidence, 2.

Declaration of Relative Prior to Action, Admissible to Show Relationship.

See Evidence, 8, 9.

DEEDS.**Right of Purchaser to Growing Crops on Failure to Reserve in Deed.**

See Crops, 1.

Deed and Lease Sufficient Proof of Title to Machinery on Land.

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DELEGATION OF POWER.**Statute Invalid as Delegation of Power.**

See Constitutional Law, 4.

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DEMURRER.**Construction Against Pleader on Demurrer.**

See Pleading, 4.

Legal Sufficiency of Pleading, as Matter of Defense, must be Tested by Demurrer.

See Pleading, 15.

DEPARTURE.

See Municipal Corporations, 8.

See Pleading, 8, 9, 12.

DEPOSITOR.**Liability of Bank in Making Loans of Depositor's Money.**

See Banks and Banking, 1.

DISCRETION OF COURT.

See Criminal Law, 11.

See Witnesses, 4.

As to Postponement of Prosecution.

See Criminal Law, 10, 11.

DISMISSAL AND NONSUIT.

See Appeal and Error, 10.

Review of Refusal to Grant Nonsuit.

See Appeal and Error, 18.

Evidence of Value Held Sufficient to Avoid Nonsuit.

See Trover and Conversion, 9.

DIVORCE.**Divorce—Review of Decree for Custody of Child.**

1. Upon appeal from a decree relating to the custody of a child of divorced persons, the Supreme Court has appellate jurisdiction only. (*Merges v. Merges*, 246.)

Divorce—Affidavits Filed in Supreme Court not Considered.

2. Under Section 556, L. O. L., providing that appeals shall be decided upon the transcript and evidence accompanying it, affidavits filed in the Supreme Court upon appeal from a decree regarding the custody of a child of divorced parties cannot be considered. (*Merges v. Merges*, 246.)

Divorce—Child's Welfare Governs Custody.

3. Although Section 7057, L. O. L., provides that parents have equal rights to the custody of their children, yet, where there is a dispute between divorced parties, the controlling consideration is the child's welfare. (*Merges v. Merges*, 246.)

Divorce—Decree Awarding Custody of Child is Conclusive.

4. Under Section 756, L. O. L., defining the effect of decrees, etc., a modified decree granting a divorced husband the exclusive custody of his son is conclusive in absence of appeal, and can be superseded only by showing that conditions have changed. (*Merges v. Merges*, 246.)

Divorce—Burden of Proof as to Custody of Child.

5. A divorced wife seeking to overturn a modified decree awarding custody of the child to its father has the burden of proof. (*Merges v. Merges*, 246.)

Divorce—Evidence as to Validity of Decree Awarding Child's Custody.

6. Evidence that a divorced wife consented to modification of a decree so as to award custody of the child to the husband in order to avoid the husband's formal application for such a modification, etc., *held* to show that she voluntarily consented to the modified decree despite her statement that she was tricked into giving her consent by representations that the change was merely formal. (*Merges v. Merges*, 246.)

Divorce—Effect of Evidence Regarding Custody of Child.

7. Evidence regarding a divorced father's affection and ability to care for his son *held* to show, contrary to the finding below, that the father should continue to have exclusive custody of the child with permission that the child visit his mother at certain stated periods. (*Merges v. Merges*, 246.)

Divorce—Appeal—Notice of Appeal—Service upon District Attorney.

8. In divorce suit, where district attorney was not served with summons, but personally appeared, and his appearance was noted in the record at the trial, an appeal could be taken from the decree rendered without serving him with notice of appeal, since his appearance, though it conferred jurisdiction, did not, in absence of some motion or other pleading filed by him, confer upon state any right to be heard further in the case. (*Parman v. Parman*, 307.)

Divorce—Untidiness of Wife not Cruelty.

9. Where defendant wife bore six children during the 10 years of her married life and did most of the cooking and housework for her husband and the hired men on his large ranch, her untidiness was not ground for divorce, as cruel and inhuman treatment. (*Parman v. Parman*, 307.)

Divorce—Charge of Infidelity Cruelty.

10. Defendant's wife's intimation to plaintiff husband that he had been guilty of improper conduct with another woman *held* not cruel and inhuman conduct warranting divorce, she having had reasonable grounds for suspicion. (*Parman v. Parman*, 307.)

Divorce—Evidence Insufficient to Show Cruel and Inhuman Treatment by Wife.

11. Husband *held* not entitled to divorce for cruel and inhuman treatment. (*Parman v. Parman*, 307.)

Divorce—Decree Where Both Parties are at Fault.

12. In divorce action where both parties were equally at fault, neither is entitled to equitable relief. (*Wakefield v. Wakefield*, 605.)

Divorce—Nonappealing Party cannot Attack Decree.

13. In divorce action, where plaintiff has appealed from a portion of the decree, defendant, upon failure to appeal, will be deemed to be satisfied with the decree as it stands, and cannot attack decree, but may defend it against plaintiff's attack. (*Crumbley v. Crumbley*, 617.)

Divorce—Appeal may be Taken from Portion of the Decree Affecting Property Rights.

14. Under Laws of 1913, Chapter 319, plaintiff in divorce action may appeal from that part of the decree relating to property rights without appealing from the whole thereof. (*Crumbley v. Crumbley*, 617.)

Divorce—Entire Record to be Considered on Appeal from Portion Relating to Property Rights.

15. On appeal by plaintiff in divorce action from that part of decree relating to property rights, her right to additional relief must depend upon equitable considerations to be derived from a perusal of the whole record, as upon a hearing *de novo*, and the decree will not be changed if, upon examination of the testimony as a whole, it appears that she did not come into court with clean hands, and was not entitled to any decree in her favor. (*Crumbley v. Crumbley*, 617.)

Divorce—Incompatibility of Temper not Ground.

16. Incompatibility of temper does not constitute a ground for divorce under Section 507, L. O. L. (*Crumbley v. Crumbley*, 617.)

Divorce—Portion of Decree Granting Divorce not Renewed on Appeal from Portion Affecting Property Rights.

17. On appeal from that portion of divorce decree relating to property rights, where neither party has appealed from the portion of the decree granting the divorce, the portion of the decree granting the divorce must remain intact, appellate court on such appeal having no power to overturn it. (*Crumbley v. Crumbley*, 617.)

Divorce—Prevailing Party not Entitled to Interest in Land of Adverse Party Unless Faultless.

18. The right of the party who has been granted a divorce to an undivided one-third part in real estate of adverse party, under Section 511, L. O. L., exists only where such prevailing party is not at fault. (*Crumbley v. Crumbley*, 617.)

Divorce—No Change of Decree on Appeal in Favor of Party Who has not Appealed.

19. On plaintiff's appeal from that portion of the divorce decree affecting property rights, where defendant has not appealed, the portion of the decree appealed from cannot be changed in defendant's favor. (*Crumbley v. Crumbley*, 617.)

Divorce—No Relief from Divorce Decree on Appeal Where Parties are in Pari Delicto.

20. On plaintiff's appeal from portion of the divorce decree affecting the property rights, no relief will be granted where, trying the case anew upon a transcript and evidence accompanying it, as required by Section 556, L. O. L., court on appeal concludes that the parties *in pari delicto*. (*Crumbley v. Crumbley*, 617.)

EASEMENTS.

Easements—Not Interfering with Right of Owner to Use Soil.

1. The conveyance of an easement in land does not pass the title or interfere with the right of the owner of the soil to occupy

it for any purpose not inconsistent with the easement. (Gamma Alpha Bldg. Assn. v. Eugene, 80.)

See Municipal Corporations, 7.

See Waters and Watercourses, 1.

EJECTMENT.

Ejectment—Title by Adverse Possession Available as Defense.

1. One acquiring title to land by adverse possession can successfully defend an ejectment action brought by the owner of the record title. (Looney v. Sears, 690.)

EMPLOYERS' LIABILITY ACT.

See Aliens, 1.

See Death, 1, 2.

ENCUMBRANCES.

See Covenants, 2, 5.

EQUITY.

Equity—Judgment—"Decree" and "Judgment" Distinguished.

1. The final determination of an action at law by a court in Oregon is called a "judgment," while that of a suit in equity is denominated a "decree." (Wright v. Wimberly, 1.)

Equity—Completion of Note Transferred Unindorsed and With Blank Space for Payee's Name.

2. Where bank received note from maker with authority to insert its name in space left blank for name of payee, and transferred note without inserting name or indorsing note, bank knew that unless its name appeared as payee transferee could not compel payment by maker, and equity will hold that to be done which ought to be done, and direct the note to be completed in conformity with the intention of the original parties. (Simpson v. First Nat. Bank, 147.)

Equity—Failure to Plead Doctrine of Clean Hands as Estoppel.

3. In a landlord's suit to remove a cloud upon title to land in the form of a lease, breached and abandoned by the tenant, a holding that plaintiffs did not come into equity with clean hands because of a showing that they had sold the land through defendant tenant as agent was improper, where no estoppel was pleaded. (Shaw v. Corbett, 270.)

See Brokers, 1.

See Quieting Title, 1.

Remedy in Compelling Transferrer to Indorse Note.

See Action, 1.

Distinction Between Law and Equity Actions.

See Action, 2.

ESTOPPEL.**Estoppel—Vendor and Purchaser—Assignment of Contract—Waiver of or Estoppel to Require Vendor's Consent.**

1. If the vendor of land, knowing that a company was about to purchase the contract from the vendee in ignorance of its requirement that the vendor's written consent be obtained, yet said nothing about the provision, and afterwards accepted the benefits of payments which the assignee company made, such vendor is prevented either on the ground of waiver or estoppel from subsequently insisting on the condition, at least without returning the payments (Smith v. Martin, 132.)

See Judgment, 6.

See Municipal Corporations, 4.

See Vendor and Purchaser, 3.

Failure to Plead Doctrine of Clean Hands as Estoppel.

See Equity, 3.

EUGENE, CHARTER OF.

See Gamma Alpha Bldg. Assn. v. Eugene, 80.

EVIDENCE.**Evidence—Judicial Notice of Financial Depression.**

1. The courts should take judicial notice that in 1897 and for some time thereafter great financial depression prevailed in the Pacific Coast states. (Wright v. Wimberly, 1.)

Evidence—Declaration of Deceased.

2. Declaration of deceased husband when he transferred money in the shape of a certificate of deposit in the Idaho bank that it was his own money was admissible. (Bosma v. Harder, 219.)

Evidence—Judicial Notice Taken of Nervous Condition Attending Pregnancy.

3. It is a well-known fact that in a condition of advanced pregnancy women are more sensitive and more suspicious than they are at other times. (Parman v. Parman, 307.)

Evidence—Parol Evidence Admissible on Issue of Consideration.

4. Testimony of conversations in regard to timber sold, had prior to execution of the bill of sale, may be considered only to determine the actual consideration for the transfer of the timber, and not to vary the terms of the written bill of sale. (Wilson v. Prettyman, 275.)

Evidence—Impeachment of Witness—Letter Used must be Pertinent.

5. A letter written by a witness and pertinent to the case in hand may be introduced in evidence for the purpose of disclosing the degree of interest the witness has in the result of the trial; but it cannot be used against the defendant for any other purpose unless it is shown to have been written by his authority or consent. If it is not shown to be pertinent to the case it cannot be used in evidence for any purpose. (State v. Rader, 432.)

Evidence—Inferences.

6. "An inference *must* be founded on a fact legally proved and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of the person whose act is in question, the course of business or the course of nature": L. O. L., § 796. It is error, therefore, to instruct the jury that an inference *may* be founded either on such a fact or in the alternative upon a deduction therefrom. (State v. Rader, 432.)

Evidence—Mental Attitude of Defendant.

7. On his way to the scene of the homicide where he had reason to believe the decedent then was in possession under claim of right the defendant offered to sell to a third party the grass on the land where the decedent then was. This fact was proper for the consideration of the jury in determining the mental attitude of the defendant towards the deceased. (State v. Rader, 432.)

Evidence—Sufficiency to Establish Relationship.

8. In an action by a nonresident alien for the death of her son, testimony of a relative and frequent visitor of the family that plaintiff treated decedent as her son and called him her son, and decedent treated plaintiff as his mother and had spoken of her as his mother, was competent to establish the relationship, being direct evidence thereof. (Garvin v. Western Coöperage Co., 487.)

Evidence—Written Declaration of Alien Relative Prior to Action Admissible to Show Relationship.

9. In an action by the nonresident alien mother of deceased servant against the latter's employer, a letter written by deceased's brother in Austria to a relative in this state, made at a time when no controversy existed as to relationship of mother and son, was admissible evidence on the question of pedigree. (Garvin v. Western Coöperage Co., 487.)

Evidence—Admission of Relationship by Defendant's Attorney in Another Action Inadmissible.

10. In an action by a nonresident alien mother for the death of her son against the latter's employer, a statement, made in argument in support of defendant's motion for nonsuit, in a cause in which this plaintiff was not a party, that it was disclosed by evidence that deceased had a mother so that his administrator could not bring action for his death, is not admissible as an admission by defendant of the relationship of mother and son. (Garvin v. Western Coöperage Co., 487.)

Evidence—Value may be Proved by Showing Amount Realized at Sales.

11. When it becomes necessary to ascertain the value of articles for which there is no open market, evidence of price realized at sales of such articles, held under conditions calculated to secure adequate returns, is admissible, provided that the time of sale is not too remote to raise a logical inference. (Dolph v. Speckart, 550.)

Evidence—Inadmissible When in Conflict With Written Stipulation.

12. In an action by an attorney to recover compensation by reason of a breach of a percentage contract, defendant having employed

other counsel, who brought action, and stipulations were entered into between the client and opponent, wherein it was agreed that the client was entitled to at least \$50,000, evidence that the client's opponent contended that the client was not entitled to the amount stipulated was properly excluded, being in direct conflict with the written stipulation. (*Dolph v. Speckart*, 550.)

Evidence—Admission by Victim of Automobile as to Speed Admissible.

13. In an action for injuries by automobile, plaintiff's statement in conversation with defendant that, had defendant been driving faster, he would have been by before plaintiff got to the place of collision, was admissible. (*Caldwell v. Hoskins*, 567.)

Evidence—Parol Evidence—Contemporaneous Agreement.

14. Parol evidence that indorser and indorsee of a note agreed that indorsee would enforce payment only from maker is incompetent because contradicting the written contract of indorsement. (*Nickell v. Bradshaw*, 580.)

Evidence—Counsel's Statement That Lease was Assigned in Writing may be Considered.

15. The statement of defendant's attorney during a colloquy in court that a lease had been assigned in writing may be considered by the jury as showing an assignment. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

See Appeal and Error, 2, 4, 9, 10, 11, 13.

See Bills and Notes, 8, 15.

See Contracts, 1, 2.

See Criminal Law, 5.

See Damages, 1.

See Divorce, 6, 7, 11.

See Fish, 4.

See Forgery, 5, 6, 13.

See Fraudulent Conveyances, 2.

See Gifts, 1.

See Landlord and Tenant, 2.

See Mortgages, 4, 7.

See Trover and Conversion, 9.

Showing Acquisition of Title by Adverse Possession.

See Adverse Possession, 1.

Supreme Court will not Resolve Conflict in Evidence.

See Appeal and Error, 19.

Findings Supported by Evidence not Reviewable.

See Appeal and Error, 25, 31.

Testimony of Bankrupt Used Against Him in Criminal Prosecution.

See Bankrupt, 1.

Not Admissible to Add to or Contradict Contract.

See Customs and Usages, 1-3.

Tending to Show Other Crimes Inadmissible.

See Criminal Law, 13.

Character Evidence to be Considered.

See Criminal Law, 16.

Credibility of Evidence is for Jury.

See Criminal Law, 18.

Showing Action or Injury not Barred.

See Limitations of Actions, 1.

As to Contents of Bill of Sale.

See Logs and Logging, 2.

Showing Consideration for Sale of Timber.

See Logs and Logging, 2.

Of Use of Safety Appliances.

See Master and Servant, 2.

Newly Discovered Evidence that X-ray did not Disclose Alleged Fracture not Ground for New Trial.

See New Trial, 1.

Plaintiff Severely Injured did not Wrongfully Suppress Evidence by not Offering X-ray not Showing Fracture.

See New Trial, 2.

Instructions not Applicable to Evidence.

See Sales, 8.

Omnibus Objection to Evidence.

See Trial, 13.

Motion to Strike Objectionable Evidence Only, Properly Granted.

See Trial, 16.

Inconsistent Testimony in Former Proceeding Concerning Same Accident Admissible.

See Witnesses, 2.

EXCEPTIONS.

See Criminal Law, 7.

EXCEPTIONS, BILL OF.

See Criminal Law, 8.

FEDERAL JURISDICTION.

See Criminal Law, 2.

FELONY.

See Homicide, 7.

FINDINGS.

Findings of Fact on Conflicting Evidence Conclusive.

See Appeal and Error, 4.

No Review of Finding on Conflicting Evidence.

See Appeal and Error, 11.

Acceptance of Verdict as Conclusive Evidence.

See Appeal and Error, 21.

Findings Supported by Evidence not Reviewable.

See Appeal and Error, 25, 31.

Finding of Fact by Special Verdict.

See Trial, 5, 6, 7.

Findings Being Only Conclusions of Law Insufficient.

See Trial, 8.

FISH.**Fish—Whether Destruction of Fish-traps by Tugboat was Negligence for Jury.**

1. In an action by the owner of a fish-trap against the owner of a barge for damages resulting to the trap, the questions whether or not the defendant negligently failed to maintain sufficient lights, to keep a lookout, or to see and avoid the trap, or operated the flotilla at a dangerous speed, or negligently failed to stop the tugboat and her tow and avoid the fish-trap, were properly for the jury. (Anderson v. Columbia Contract Co., 171.)

Fish—Paramountcy of Right of Navigation Does not Extinguish Common Right of Fishery.

2. The paramountcy of the right of navigation does not extinguish the common right of fishery, although the former does, whenever there is a necessary conflict, limit the latter and compel it to yield, so far as the right of fishery interferes with the fair, useful, and legitimate exercise of navigation rights, but the navigator must use ordinary care and due regard to property rights of fishermen. (Anderson v. Columbia Contract Co., 171.)

Fish—Whether Destruction of Fish-trap by Tugboat was by Negligent Navigation Question for Jury.

3. In an action for the negligent destruction of a fish-trap by a tugboat, an instruction that it was the "duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated" held erroneous, since it was not negligence *per se* to operate the boat outside of the usual course followed by vessels; the matter being a question of fact for the jury. (Anderson v. Columbia Contract Co., 171.)

Fish—Evidence Sufficient to Show Authorized Construction of Fish-trap.

4. Where plaintiff, in an action for damages for injuries resulting from his fish-trap being struck by defendant's tugboat, was authorized by both the State of Washington and the United States to erect and maintain the trap, evidence held to show that a part, if

not all, of the portion of the trap injured or destroyed was erected in accordance with such permits and was a legal obstruction. (*Anderson v. Columbia Contract Co.*, 171.)

FISH-TRAP.

Action for Destruction Maintainable in State Other Than Where Located.

See Courts, 2.

Evidence of Daily Catch Admissible in Action for Destruction of Fish-trap.

See Damages, 1.

FOOD.

See Municipal Corporations, 15.

FORECLOSURE.

See Bankruptcy, 3.

See Mortgages, 1-7.

No Attorney Fee Allowed on Foreclosure.

See Chattel Mortgages, 4.

FOREIGN JUDGMENT.

See Judgment, 3, 4.

FORFEITURE.

Right of City Council to Forfeit Franchise.

See Waters and Watercourses, 2, 3.

FORGERY.

Forgery—Indictment—Purport of Instrument.

1. Where an indictment for forgery described a false and forged "writing, check, receipt and instrument, being in the form of and purporting to be an indorsed, canceled and paid check, and being in the words and figures as follows, to wit," followed by a copy of the check with the indorsement, words, figures and marks thereon, it was not essential that the words "purporting to bear the indorsement of," should be employed. (*State v. Frasier*, 90.)

Forgery—Indictment—Legal Efficacy of Instrument.

2. In an indictment for uttering a forged receipt, it should appear from the indictment that the receipt is *prima facie* capable of being used as legal proof in some way. (*State v. Frasier*, 90.)

Forgery—"Receipt"—Canceled Check.

3. A canceled check or check indorsed and stamped "Paid" may be the subject of forgery under Section 1996, L. O. L., such an instrument serving in the business world as a voucher or receipt for the payment of the amount of money named in the check. (*State v. Frasier*, 90.)

Forgery—Indictment—Name of Person Defrauded.

4. Under Section 1996, L. O. L., an indictment for uttering a forged receipt need not state the name of the person defrauded. (State v. Frasier, 90.)

Forgery—Indictment—Proof.

5. It being alleged in an indictment that a forged check was published to A., as a referee in bankruptcy, it was necessary for the proof to show the same. (State v. Frasier, 90.)

Forgery—Evidence.

6. Under an indictment for uttering a forged canceled check as a receipt, alleging that it was published to A. as referee in bankruptcy, it was proper for the state to show that A. was acting as a referee in bankruptcy by appointment of the federal court, and to introduce evidence of the proceedings in bankruptcy in the bankrupt estate of the defendant, as part of the circumstances of the transaction relating to the canceled check. (State v. Frasier, 90.)

Forgery—Indictment—Tenor of Instrument.

7. Under Section 1996, L. O. L., relating to forgery, it was not necessary to set out the tenor of the instrument alleged to be forged, in view of page 1013, Form 15, L. O. L. (State v. Frasier, 90.)

Forgery—Indictment—Name of Person Defrauded.

8. Under Section 2004, L. O. L., the name of the person defrauded need not be inserted in an indictment for uttering a forged receipt. (State v. Frasier, 90.)

Forgery—Indictment—Legal Efficacy of Instrument.

9. An averment in an indictment for uttering a forged receipt in the form of a canceled check, indorsed and stamped "Paid," etc., that the instrument was published to A., as referee in bankruptcy, as a receipt and as evidence of the payment of a debt, was all the extrinsic facts necessary to set out, in addition to the instrument itself, to show that the receipt, if it was genuine, would be of force as legal proof. (State v. Frasier, 90.)

Forgery—Indictment—Extrinsic Matter.

10. In an indictment for uttering a forged instrument, where the meaning of the transaction can be sufficiently extracted from the instrument itself, it is not necessary to state matters of evidence so as to make out more fully the charge. (State v. Frasier, 90.)

Forgery—Indictment—Receipt.

11. A receipt for money paid is not such instrument that an indebtedness from the person to whom it purports to be given to the maker of it need be shown in an indictment for uttering a forged receipt, because, if in fact there were no such indebtedness, still the party giving it would be liable for the money acknowledged to have been received. (State v. Frasier, 90.)

Forgery—Alteration of Instrument.

12. One who alters a genuine instrument may be charged with forgery of the entire instrument. (State v. Frasier, 90.)

Forgery—Uttering Instrument—Evidence—Directed Verdict.

13. In a prosecution for uttering a forged receipt, namely, a canceled check stamped "Paid" and indorsed, *held*, that evidence strongly supported a conviction, so that a request to direct a verdict of acquittal was properly denied. (*State v. Frasier*, 90.)

Forgery—Instructions.

14. In a prosecution for uttering a forged receipt, namely, a canceled check stamped "Paid," and indorsed, an instruction relative to the theory of the state that the indorsement was forged on a check, and that, taken together with the check, it operated and was used as a receipt for money paid, *held* properly to submit the issues in the case. (*State v. Frasier*, 90.)

See Criminal Law, 3.

FRANCHISE.

See Constitutional Law, 2.

See Municipal Corporations, 9.

See Waters and Watercourses, 2, 3.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Defendant Grantee must be Without Notice of Fraud, and have Paid Valuable Consideration.

1. Under Sections 7397, 7400, 7401, L. O. L., three things must concur to protect the title of a purchaser of property where the conveyance is attacked by creditor of the vendor as fraudulent: (1) He must buy without notice of bad intent on the part of vendor to defraud; (2) he must be a purchaser for valuable consideration; and (3) he must have paid the purchase money before he had the notice of fraud. (*Farmers' Nat. Bank v. Renfro*, 260.)

Fraudulent Conveyances—Evidence Insufficient to Show Transaction Fraudulent.

2. In a suit by an Oklahoma corporation which had recovered in courts of that state a judgment against defendant's husband attacking as fraudulent a conveyance of property by the husband to her, and seeking to reach land acquired in Oregon by defendant with the proceeds of the property conveyed, etc., evidence *held* insufficient to show that the transaction was fraudulent, and open to attack, within Sections 7397, 7400, 7401, L. O. L. (*Farmers' Nat. Bank v. Renfro*, 260.)

See Judgment, 2.

FULL FAITH AND CREDIT.

Foreign Judgment Entitled to Full Faith and Credit.

See Judgment, 3.

FUTURE ADVANCES.

See Mortgages, 4-7.

GIFT.**Gifts—Proof of Parol Gift of Land Must be Clear.**

1. In suit by father against his daughter and her husband to be adjudged the owner of real property standing in his name but in defendants' possession and claimed by them under parol gift, defendants had the burden of establishing the gift clearly and satisfactorily, the same as if they were suing to compel plaintiff to specifically perform a parol contract for a gift of land. (Ward v. Ward, 405.)

See Husband and Wife, 3, 4.

GREAT BODILY HARM.

See Homicide, 7.

GUARANTY.**Guaranty—Necessity or Words Showing a Contract.**

1. While the word "guaranty" is not essential to create a contract of guaranty, and the word "warrant" is not indispensable for the creation of an express warranty, and while there is no particular form or expression necessary to create a strict guaranty or a pure warranty, still the language employed by the parties must in some way indicate an intention to contract. (Simpson v. First Nat. Bank, 147.)

HARMLESS ERROR.

See Appeal and Error, 6.

Remarks of Court as to Extent of Proof Required Harmless.

See Appeal and Error, 20.

HEALTH.**Health—Ordinance to Protect Health With No Relation to the Matter Unconstitutional.**

1. An ordinance enacted to protect the public health, but which has no real or substantial relation to the subject matter, and is an unreasonable and unwarranted interference with a lawful business, is unconstitutional. (Portland v. Traynor, 418.)

HOMICIDE.**Homicide—Attorney's Advice to Deceased.**

1. In the absence of evidence showing an attempt to dispossess him of the premises where he was killed, the advice of an attorney given to the decedent about the validity of his tenure is collateral and immaterial. (State v. Rader, 432.)

Homicide—Refusal of the Defendant to Submit to Arrest.

2. A statement made by the defendant the next day after the homicide to the effect that he would not permit a deputy sheriff to take him and that he was not afraid of the law is incompetent and cannot be used against him, in the absence of showing that he attempted to resist arrest. (State v. Rader, 432.)

Homicide—Self-defense—Intent of Assailant not Controlling.

3. It is erroneous to instruct the jury in a homicide case that "if the intention of the assailant is only to commit a trespass or simple beating it will not justify the killing," because the right of self-defense is not controlled by the intention of the assailant. The assailed may act upon appearances. (State v. Rader, 432.)

Homicide—Self-defense—Uncommunicated Threats of Deceased.

4. The decedent's threats of violence against the defendant, although not communicated to the latter, are admissible in evidence to aid the jury in determining who was probably the aggressor in the fatal affray, and on request the defendant is entitled to an instruction informing the jury of this principle. (State v. Rader, 432.)

Homicide—Self-defense—Retreat.

5. A defendant is not bound to retreat from a place where he has a right to be when he is unlawfully assaulted; but may stand his ground and defend himself against the attack. (State v. Rader, 432.)

Homicide—Self-defense Proportionate to Danger.

6. It is essential to the right of self-defense that it be not excessive nor disproportionate to the force actually or apparently involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time under all the circumstances surrounding him. (State v. Rader, 432.)

Homicide—Self-defense—Felony—Great Bodily Harm.

7. Violence to the person which amounts to no more than the misdemeanor of simple assault and battery does not justify taking life; but a person is justified in slaying to avert imminent danger of violence amounting to a felony. Violence of the degree of felony is "great bodily harm," but that which amounts only to a misdemeanor is not "great bodily harm." It is not error to charge the jury that "the danger must be that of a threatened felony" before the defendant may kill his assailant in self-defense. (State v. Rader, 432.)

HUSBAND AND WIFE.**Husband and Wife—Fund Accumulated During Marriage Separate Property of Husband.**

1. Where fund was accumulated in Oregon and was in possession of husband, who, when he and his wife moved to Idaho, deposited it there in his own name and husband subsequently withdrew it from the Idaho bank and placed it in possession of a brother in Oregon, held that the fund remained the separate property of the husband, in view of Section 799, subdivisions 4, 11, 12, 19, and Sections 7034, 7044, 7045, 7050, L. O. L. (Bosma v. Harder, 219.)

Husband and Wife—Separate Property Taken to Community Property State.

2. Separate property, acquired in a state where community property is unknown, does not become community property, but remains

separate property when transported into a community property state. (*Bosma v. Harder*, 219.)

Husband and Wife—Gift of Separate Property of Husband Valid Against Wife.

3. Where fund was accumulated in Oregon and was in possession of husband, who when he and his wife moved to Idaho deposited it there in his own name, and husband subsequently withdrew it from the Idaho bank, and of his own accord gave it to his brothers in Oregon, held gift was valid against wife. (*Bosma v. Harder*, 219.)

Husband and Wife—Gift of Community Property by Husband Valid

4. Under Revised Codes of Idaho, Section 2686, providing that husband has management and control of community property with like absolute power of disposition as he has of his separate estate, except as regards homestead or community property occupied as a residence, an absolute unrestricted gift by a husband to his brothers of money is valid against wife though the money be treated as community property. (*Bosma v. Harder*, 219.)

Husband and Wife—Note Signed by Wife not Joint Obligation of Husband and Wife.

5. A promissory note signed by the wife alone is not the husband's joint obligation, since a joint obligation is one by which several obligors promised to perform the obligation, nor is it made joint by the fact that the proceeds were used in paying family expenses, for which Section 7039, L. O. L., renders the husband and wife equally liable. (*France v. France*, 414.)

INDICTMENT.

Indictment and Information—Statutory Offense.

1. It is the general rule that, if an indictment is based upon a statute, it is sufficient if it follows the wording thereof. (*State v. Frasier*, 90.)

Indictment and Information—Certainty.

2. Under Section 1449, L. O. L. an indictment will not be held insufficient where the acts charged as a crime were displayed with such degree of certainty as to fully inform defendant of nature of offense with which he was charged, and to enable a person of common understanding to know what is intended and to prepare for his defense. (*State v. Frasier*, 90.)

See *Forgery*, 1, 2, 4, 5, 7-11.

Failure to Try Accused at First Term of Court After Filing of Indictment.

See *Criminal Law*, 9.

INDUCEMENT.

See *Pleading*, 3.

INFERENCES.

See *Evidence*, 6.

INFIDELITY.

See Divorce, 10.

INSPECTION.**Inspection—Exception in Statute Requiring Inspection of Hides for Shipment Destroys Effect in Sparsely Settled Country—"Farmer"—"Ranch."**

1. A "farmer" is one who resides on and cultivates a farm, mainly deriving his support therefrom, and a "ranch" is a tract used for grazing and rearing livestock; so that, assuming that "farmer" and "ranch owner" have a specific legal meaning as used in Laws of 1919, page 732, Section 3, excluding farmers, ranch owners, and small isolated dealers from the requirement of inspection of hides as a condition to their shipment by common carrier, then the protection from theft intended by such statute is denied to the sparsely settled and isolated sections of the state. (State ex rel. v. Hines, 607.)

See Commerce, 1.

See Sales, 2, 4.

INSTRUCTIONS.

See Forgery, 14.

See Justices of the Peace, 1.

See Sales, 3.

See Trial, 1, 3, 4, 12.

Misleading Instructions.

See Appeal and Error, 5.

See Trial, 2.

Instructions as to Reasonable Doubt.

See Criminal Law, 17.

Instructions not Applicable to Evidence.

See Sales, 8.

Instructions Covered by Those Given Properly Refused.

See Trial, 15.

INSURANCE.**Insurance—Personal Contract by Broker to Procure Insurance.**

1. A letter, signed by a firm of insurance brokers, stating that, "pending receipt of our covering notes, this will serve to protect you against loss * * from fire" on certain property, "coverings being in" defendant company, did not bind defendant, since on its face it did not amount to anything except the personal promise of the brokers to procure from defendant certain insurance for plaintiffs. (Crans-ton v. California Ins. Co., 869.)

Insurance—Existing Law as Part of Contract.

2. Under the presumption of Section 799, subdivision 24, L. O. L., "that the law has been obeyed," where insurance company's "covering note" provided that the insurance was subject to all the conditions of a certain kind of policy used by insurer, it must be presumed that the policy contained the provisions enjoined by the

standard policy law (Laws 1911, p. 279), such as provision as to forfeiture on change in insured's interest, title, or possession. (*Cranston v. California Ins. Co.*, 369.)

Insurance—Automobile Fire Insurance—Change of Ownership Defenses.

3. Where insured automobile dealer sold and delivered an insured car to one who drove it to another state without the knowledge or consent of the insurer, and it was there destroyed by fire, the insurer was not liable for the loss, under provision forfeiting for change of interest, title or possession. (*Cranston v. California Ins. Co.*, 369.)

Insurance—Contract by Brokers Without Authority to Act for Insurer.

4. Where insurance brokers had never before acted as agents for defendant insurance company, and did not represent to plaintiff, insured, that they had any authority to act for or on behalf of defendant, and the instrument, alleged to bind defendant, wherein brokers promised to insure automobiles, does not purport to represent such authority as against the defendant, the case is not one of an undisclosed principal to be proceeded against upon discovery of identity. (*Cranston v. California Ins. Co.*, 369.)

Insurance—Proposal to Take Insurance and Counter Offer.

5. Where insurance brokers sent to defendant insurance company a copy of their letter to plaintiff, which merely stated they would protect plaintiff from fire loss pending receipt of their covering notes, the company, never having had any connection with the brokers, was justified in treating it as a proposal to take insurance, and since, in view of the requirements of the standard policy law (Laws 1911, p. 279), it could not be presumed that defendant violated the law and assented to the copy of a letter as an insurance contract, a policy and covering notes which it sent in reply amounted simply to a counter proposition, which would not give rise to a contract, unless accepted. (*Cranston v. California Ins. Co.*, 369.)

Insurance—Mere Payment of Premium Does not Create Insurance Contract.

6. Where insurer's counter offer, embodied in the policy and covering notes it sent to brokers applying for insurance for plaintiff, was not accepted by plaintiff, plaintiff's payment of premium would confer no rights, except the right to recover the payment as for money had and received. (*Cranston v. California Ins. Co.*, 369.)

INTENT.

See Homicide, 3.

INTEREST.

Interest—From Date of Judgment Rather Than from Breach of Contract.

1. In recovery for seller's breach of contract of sale of hay crop, interest could not be allowed from the time of breach to the day of trial, but only from date of judgment. (*Propst v. William Hanley Co.*, 397.)

Interest—Recovery Depends on Statute.

2. The right to recover interest as such must be found in the statute which confers it, and unless included it must be deemed excluded. (*Looney v. Sears*, 690.)

See *Municipal Corporations*, 12.

Correcting Judgment in Matter of Interest.

See *Appeal and Error*, 17, 22, 26.

Record Owner of Land in Adverse Possession of Another is not Entitled to Interest on Taxes Paid.

See *Damages*, 2.

JUDGMENT.

Judgment—Conclusiveness on Party Notified to Defend.

1. Where a party against whom an ultimate liability is claimed is fairly and fully notified of the claim, and that the action is pending and given full opportunity to defend or to participate in the defense, if he then neglects or refuses to make any defense he may claim to have, the judgment will bind him in the same way and to the same extent as if he had been made party to the record. (*Estep v. Bailey*, 59.)

Judgment—In Suit by Creditor to Subject Lands to Judgment, Defendant can Question Origin of Creditor's Claim.

2. Where a judgment was rendered in Oklahoma against defendant's husband and the judgment creditor then sued defendant and husband in Oregon, asserting that a conveyance by the husband to defendant was fraudulent, and seeking to subject to its claim Oregon lands acquired by defendant with the proceeds of the property conveyed to her, *held* that defendant might inquire into the origin of the claim of the judgment creditor. (*Farmers' Nat. Bank v. Renfro*, 260.)

Judgment—Foreign Judgment Entitled to Full Faith and Credit.

3. A judgment of the courts of one state is, as to matters adjudicated, entitled to full faith and credit in another state. (*Farmers' Nat. Bank v. Renfro*, 260.)

Judgment—Pleading—Pleading must Support the Judgment.

4. In replevin the pleading must support the judgment and contain allegations of fact rather than conclusions of law. (*Almada v. Vandecar*, 515.)

Judgment—Sufficiency of Complaint to Support Judgment.

5. A defective statement of a good cause of action will support a judgment, but a pleading entirely omitting an essential fact or facts will not support a judgment. (*Almada v. Vandecar*, 515.)

Judgment—Attorney Estopped by Judgment Against Client as to Land in Which Attorney had Interest.

6. Where, with a view of bringing suit to quiet title to land, one claiming ownership deeded a one-third interest to his attorney as a contingent fee and the attorney as such brought suit in which his client asked for a decree that he was owner of all the land, and a

decree was rendered against his client and in favor of the defendant, in a subsequent action by the defendant for the value of the use and occupation of the same, the attorney cannot set up his deed as a defense, as the legal effect would be to litigate the identical question passed on in a prior suit. (Crow v. Abraham, 626.)

See Costs, 2, 4.

See Covenants, 1, 6.

See Equity, 1.

Description of Judgment in Notice of Appeal.

See Appeal and Error, 27, 28.

Correction of Mistake in Judgment as to Interest.

See Appeal and Error, 22.

Correcting Judgment in Matter of Interest.

See Appeal and Error, 17.

Modification of Judgment Sufficient to Carry Costs to Appellant.

See Costs, 3.

Interest from Date of Judgment Rather than from Breach of Contract.

See Interest, 1.

JUDICIAL NOTICE

See Evidence, 1, 4.

JURISDICTION.

See Appeal and Error, 12.

See Criminal Law, 1-4.

See Quietening Title, 1.

JURY.

Instruction Harmless that Three Fourths of Jury Could Return Verdict.

See Justices of the Peace, 1.

Where Jury Fails to Assess Amount of Recovery.

See Justices of the Peace, 2.

Improper Rendition of Justice's Judgment on Verdict.

See Justices of the Peace, 3.

JUSTICES OF THE PEACE.

Justices of the Peace—Harmless Instruction That Three Fourths of Jury Could Return Verdict.

1. Instruction by justice of the peace to the jury that three fourths of their number would be sufficient to agree upon a verdict was harmless, where the verdict returned in fact was unanimous. (Goyne v. Tracy, 216.)

Justices of the Peace—Assessment of Amount of Recovery.

2. Under Section 156, L. O. L., in an action for the recovery of money the jury must assess the amount of recovery, and a verdict

which merely found for plaintiff did not give the justice of the peace authority to render judgment on it, but he should have caused the jury to correct it, or have sent the jury out again, pursuant to Section 150. (*Goyne v. Tracy*, 216.)

Justices of the Peace—Improper Rendition of Justice's Judgment on Verdict.

3. Justice of the peace having had no authority to render judgment in an action for the recovery of money on the jury's verdict merely finding for plaintiff and not assessing the amount, and such error appearing on the record, there is presented a question amenable to the right of review under Section 605, L. O. L., providing that writ of review shall be concurrent with the right of appeal, etc. (*Goyne v. Tracy*, 216.)

Justices of the Peace—Power of Circuit Court to Direct Justice of the Peace.

4. Where the record before the Circuit Court on return of writ to review judgment of a justice showed judgment improperly rendered on verdict in an action to recover money not assessing the amount, but merely finding for plaintiff, the Circuit Court, under Section 611, L. O. L., had power to affirm, modify, reverse or annul the decision, or by mandate to direct the inferior court to proceed according to its decision. (*Goyne v. Tracy*, 216.)

LABORERS' LIEN.

Lost by Removal of Lumber.

See Logs and Logging, 3-10.

Enforcement of, Notwithstanding Surplusage in Lien Statement.

See Logs and Logging, 9.

LANDLORD AND TENANT.

Landlord and Tenant—Right of Tenant to Crops as Against Landlord and His Grantee.

1. A tenant is entitled, as against the landlord and his successors, to the annual crops raised on the land during the tenancy, and as between them such crops are not a part of the freehold, but the property of the tenant, in the absence of contrary stipulation. (*Estep v. Bailey*, 59.)

Landlord and Tenant—Evidence of Tenant's Abandonment.

2. In a landlord's action to remove a lease as a cloud upon title, evidence held to indicate clearly an abandonment of the premises by the tenant. (*Shaw v. Corbett*, 270.)

Landlord and Tenant—Nominal Damages for Breach of Lease on Shares.

3. Where landlords, suing for damages for tenant's failure to perform the terms of his lease on shares, have not furnished sufficient data in the testimony from which the court can estimate advisedly the amount of damages, they will be allowed only nominal damages. (*Shaw v. Corbett*, 270.)

Landlord and Tenant—Sufficiency of Complaint in Action for Unlawful Ouster.

4. In action by lessee's assignee against lessor for damages for unlawful ouster, complaint *held* sufficient. (*Lun v. Mahaffey*, 292.)

Landlord and Tenant—Landlord's Right to Re-enter.

5. Where lease gave lessor right to re-enter and repossess herself of premises upon nonpayment of rent within 10 days after rent shall become due, lessor's re-entry upon premises after lessee's assignee had been in arrears for more than 10 days, and after forfeiture had been declared, did not entitle assignee to damages for unlawful ouster, but would have justified a directed verdict for defendant. (*Lun v. Mahaffey*, 292.)

See Brokers, 1.

LEASE.

See Brokers, 1.

See Covenants, 2.

See Landlord and Tenant, 3.

Counsel's Statement That Lease was Assigned in Writing may be Considered by Jury.

See Evidence, 15.

Lease and Deed Sufficient Proof of Title to Machinery on Land.

See Trover and Conversion, 4.

LEASEHOLD.

See Trover and Conversion, 1.

LICENSES.

Licenses—Ordinance Giving Officer Arbitrary Powers as to Issuance Invalid.

1. Any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant, is void. (*Portland v. Traynor*, 418.)

Licenses—Defense for Operating Soft Drink Establishment Without License Insufficient.

2. The contention that the medical examiners of the city are careless and negligent in the discharge of their duties goes only to the administration and not to the validity of an ordinance requiring, as a condition to issuance of a license, medical examination of persons owning or working in food and soft-drink establishments, and is not a defense to a charge of having violated the ordinance by operating such an establishment without a license. (*Portland v. Traynor*, 418.)

LIENS.

See Logs and Logging, 8-10.

LIMITATION OF ACTIONS.**Limitation of Actions—Evidence Showing Action for Injury not Barred.**

1. In an action by a servant for personal injury, evidence held sufficient to sustain a finding that plaintiff was injured in January, 1916, and not in December, 1915, so that limitations had not run. (Joyner v. Crown Willamette Paper Co., 207.)

LOGS AND LOGGING.**Logs and Logging—Evidence of Misrepresentation of Contents of Bill of Sale of Timber.**

1. In suit to restrain defendant from cutting and removing standing timber from plaintiffs' lands under a bill of sale, evidence held insufficient to show any misrepresentation by defendant as to the contents of the instrument which she induced plaintiffs to sign. (Wilson v. Prettyman, 275.)

Logs and Logging—Evidence Showing Consideration for Sale of Timber.

2. In suit to restrain defendant from cutting and removing standing timber from plaintiff's lands under bill of sale, evidence held to sustain finding that the sole consideration moving from defendant for the transfer of the timber was her agreement to build a house and barn on her property adjoining plaintiffs' farm, thus increasing values in neighborhood. (Wilson v. Prettyman, 275.)

Logs and Logging—Right to Laborers' Liens is Statutory.

3. The right to a laborer's lien on lumber is statutory, and in the absence of a specific law such a right would not exist. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Statute Giving Labor Lien Liberally Construed.

4. Section 7462, L. O. L., giving lien for labor performed in the manufacture of lumber, is remedial, and should be liberally construed in favor of the lien. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Laborers' Lien Lost by Removal of Lumber.

5. Under Section 7462, L. O. L., giving lien for services performed in the manufacture of lumber while the same remains at the yard wherein manufactured, laborers had no lien upon lumber which had been hauled 12 miles from the yard wherein it was manufactured, in view of Sections 7464-7467. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Liens for Cutting Logs and Manufacturing Lumber Distinct.

6. Section 7461, L. O. L., giving laborer lien for labor in the cutting of logs, and Section 7462, providing for laborers' lien for labor performed in the manufacture of lumber, though parts of the same act are separate and distinct from each other; the former being intended for security to the logger and the latter to the operators in the mill. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Lien Statement must Specify Labor Cutting Logs and Manufacturing Lumber.

7. Even if laborer could make and enforce a joint or dual lien for services in cutting logs under Section 7461, L. O. L., and in manufacturing lumber under Section 7462, he would be required to specify in his statement the amount and value of his labor for cutting logs and the amount and value thereof in manufacturing lumber. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Lien for Cutting Logs Covers Lumber Manufactured Therefrom.

8. Under Section 7461, L. O. L., a logger has a lien, not only upon the logs cut, but upon the lumber manufactured therefrom, so long as it can be followed and identified. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Enforcement of Lien Notwithstanding Surplusage in Lien Statement.

9. Where the laborers were paid in full at the time of the removal of sawmill to a new site, the lien for labor will be enforced as to the lumber at the new site, though the claim was for a lien on all of the lumber, including that on the old site. (First Nat. Bank of Union v. Wegener, 318.)

Logs and Logging—Attorney's Fee Granted on Foreclosure of Lien Reasonable.

10. Under the evidence, held, that \$250 is a reasonable attorney's fee for foreclosing of 14 laborers' liens on lumber. (First Nat. Bank of Union v. Wegener, 318.)

MACHINERY.

See Trover and Conversion, 2-9.

MANDAMUS.

Constitutionality of Statute may be Determined by Mandamus.

See Constitutional Law, 3.

MASTER AND SERVANT.

Master and Servant—Complaint Sufficient Without Alleging Master's Rejection of Workmen's Compensation Act.

1. There being no presumption under the Workmen's Compensation Act as to whether the employer is subject thereto, the injured servant's complaint is not insufficient for failure to allege that defendant had elected not to come under the act, the matter being one of affirmative defense. (Garvin v. Western Coöperage Co., 487.)

Master and Servant—Evidence of Use of Safety Appliances Admissible to Show Practicability.

2. In an action under the employers' liability law for death in a collision between an engine and a runaway logging-car, testimony that witness had worked for years in nearly every possible capacity in logging camps using trucks, and that on logging roads where there

are grades, safety lines, safety rails, and derails are used, was competent on the question of practicability of such safety devices. (Garvin v. Western Cooperage Co., 487.)

MEASURE OF DAMAGES.

Proper Measure of Damages for Son's Death.

See Death, 2.

Measure of Damages is Market Value.

See Trover and Conversion, 8.

MISDESCRIPTION.

See Pleading, 1.

MISREPRESENTATIONS.

Of Contents of Bill of Sale of Timber.

See Logs and Logging, 1.

MISTAKE.

See Appeal and Error, 22.

MODIFICATION

See Appeal and Error, 3, 12.

See Contracts, 3.

See Costs, 3, 4.

MORTGAGES.

Mortgages—Construction of Statutes Regulating Foreclosure.

1. No rule having existed at common law respecting the foreclosure of mortgages, statutes regulating the procedure in such a case are not in derogation of common law and should not be strictly construed. (Wright v. Wimberly, 1.)

Mortgages—Foreclosure by Granting Equity of Redemption not of Common-law Origin.

2. Unless a custom of the common law had its origin when the memory of man runneth not to the contrary, or from the beginning of the reign of Richard I, the rule could not be classed as part of the common law, so that foreclosure of mortgages by granting equity of redemption is not of common-law origin, having been instituted probably in the reign of Queen Elizabeth. (Wright v. Wimberly, 1.)

Mortgages—Foreclosure as Bar to Action for Deficiency.

3. Although Section 426, L. O. L., abolishing deficiency judgments upon foreclosure of real estate purchase price mortgages, does not so modify Section 429, relating to action at law on indebtedness secured by mortgage, as to prevent the holder of purchase-money mortgage note from disregarding the mortgage and bringing action for personal judgment on the note; yet, where such holder does sue to foreclose, then, since the court is inhibited by Section 426 from awarding under Section 425 a conditional recovery or "deficiency judgment" against the mortgagor, its determination of the entire sum due upon the

personal obligation, as required by Section 422, is not equivalent to decreasing recovery thereof, except only as the award is limited to the mortgaged realty; and, as the foreclosure sale necessarily exhausts the power given to the court, the effect as *res judicata* of the decree thus denying deficiency judgment is to prohibit a later separate action at law by the mortgagee for such a deficiency. (*Wright v. Wimberly*, 1.)

Mortgages—Future Advances—Sufficiency of Evidence.

4. In suit to foreclose a mortgage for future advances, evidence held insufficient to establish plaintiff's right to more than \$83.40 on an amount of \$250 claimed by plaintiff to have been paid by the original mortgagee, her deceased husband, as attorney for defendant mortgagor, for a metallic casket for the remains of defendant's husband. (*Graber v. Boswell*, 70.)

Mortgages—Future Advances.

5. In suit by widow of attorney, who had acted for defendant widow of his friend, to foreclose a mortgage given by defendant to such attorney to secure advances, the attorney having filed a voucher against the estate for an amount of \$50 claimed to have been paid for exhuming and transporting the remains of defendant's husband for interment elsewhere, the additional charge of \$111 shown in his personal account against the widow, who insisted that even the \$50 charge is excessive, should be eliminated. (*Graber v. Boswell*, 70.)

Mortgages—Burden of Proof—Advances by Mortgagee.

6. In an action to foreclose a mortgage securing a note given to cover future advances, the burden of proof rests upon the plaintiff to establish the amount of money advanced to the defendant. (*Graber v. Boswell*, 70.)

Mortgages—Evidence on Foreclosure—Items to be Considered.

7. In an action to foreclose a mortgage securing a note given to cover future advances, the fact that mortgagor shipped mineral water to the mortgagee must be disregarded, where there is no evidence as to the quantity of water shipped or its market value. (*Graber v. Boswell*, 70.)

MOTION.

See Criminal Law, 6.

Motion to Strike Objectionable Testimony Only Properly Granted.

See Trial, 16.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Assessments Including Engineer's Charge Valid.

1. Where an ordinance authorizing the opening of a street authorized engineer's charges to be included as a part of the improvement, engineering expenses could be imposed by assessment, although the engineer was not specially employed for the particular improvement and was paid a regular salary by the city from the general fund. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Improvement Contract Including Future Repairs Does not Invalidate Assessment.

2. A contract for paving, which contained provision "that the pavement shall be free from any defects due to faulty workmanship or materials, and that for a period of five years from its completion the city contractor will at his own expense repair and make good any defects arising from such faulty materials," etc., was not invalid as being a contract for repairs not chargeable to private property. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Contract for Paving not Unlawful Delegation of Powers to Engineer.

3. Where a civil engineer, upon request of city officials, has prepared plans and specifications for contemplated improvement, and the officials enter into a contract for the construction thereof, there is not an unlawful delegation to the engineer of the right to decide what are necessary details; the action of the city officials in entering into the contract making the plans and specifications of the engineer their own. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Petitioner for Improvement Estopped to Attack Assessment.

4. Where an abutting property owner petitions the city council to pave a street, the action of the council in contracting for and making the improvement is conclusive, and the petitioner cannot complain that the cost of the improvement exceeds the benefits. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Paving Assessment on Property Fronting on Two Streets.

5. One owning property on a corner abutting upon one street 90 feet and on another 240 feet cannot maintain that his property does not front upon the street on the long side of his property, and that he is not liable for the burden imposed by paving of such street under a charter providing that each lot or part of lot abutting a street or alley, graded, improved or repaired shall be liable for the full cost of making the same upon the half of the street or alley in front or abutting upon it, but that, when the land adjacent to such street shall not have been laid off into lots or blocks, then the cost of the improving such street shall be assessed to the owner or owners of such land within 160 feet of such improved street. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Assessments for Improvements not Objectionable Because Contract Provided for Eight-hour Day.

6. In view of Laws of 1913, page 11, expressly forbidding a municipality either directly or through a contractor to require more than eight hours per day or forty-eight hours per week from any employee, one assessed for an improvement cannot maintain that city had no right to limit the employment of laborers for more than eight hours per day in its contract for the improvement. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Retaining Wall Improvements Built on Property Subject to Easement.

7. A contract of a city for the paving of a street was not invalid by reason of the required construction of a retaining wall at

the end of the street abutting upon a mill-race, although the owner of the mill-race had an easement on the property where the retaining wall was built, in that it had a right to widen and deepen its mill-race. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Departure from Contract for Improvement

8. Where a city was authorized to pave a street which ran to the banks of a mill-race, the construction of a retaining wall at the end of the street abutting on the mill-race was not a departure from the purpose of the improvement, although made for the whole width of the street, for the purpose of also supporting a fill for sidewalks that might be constructed. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Municipal Corporations—Invalidity of Perpetual Franchise.

9. A franchise ordinance granting a right to lay and protect water-mains in the streets and alleys of the town "so long as this contract shall remain inviolate" constitutes a perpetual utility franchise, and hence is invalid. (*Newsom v. City of Rainier*, 199.)

Municipal Corporations—Recovery Despite Deviations not Authorized in Writing by Engineer.

10. In an action against a city to recover the price for constructing a reservoir and water system, in view of the contract, making the city's engineer the referee to determine the amount, quality, and fitness of work, and evidence showing that deviations from the contract by the contractor were at the instance of the engineer, held, that evidence supports court's finding for plaintiff contractor, despite deviations from the contract not authorized in writing by the engineer as required. (*Oregon Engineering Co. v. West Linn*, 234.)

Municipal Corporations—Recovery for Construction of Improvement Despite Defects of Plan.

11. Where the work of a contractor to build a reservoir and water-works system for a city was well done and in substantial compliance with its contract, and any unsatisfactoriness in the result was from a defective design, selected by the water commission, rather than from any fault of the contractor, the contractor can recover a retained portion of the price of the work, accepted by the water commission on recommendation of its engineer as required by the contract. (*Oregon Engineering Co. v. West Linn*, 234.)

Municipal Corporations—Payments on Improvement Contract—Right to Credit for Interest on Advancements.

12. Where the contractor to build a city's water system and reservoir received its compensation in municipal bonds in advance, the city, when sued to recover a deficiency in payments, is entitled to a credit on any recovery for interest accruing on the bonds during the time for which they were paid in advance as money advanced to the contractor for the purchase of materials. (*Oregon Engineering Co. v. West Linn*, 234.)

Municipal Corporations—Ordinance Permitting Prohibition of Lawful Occupation Void.

13. An ordinance by or under which an occupation lawful, and not injurious to person, property, or public, when lawfully conducted,

may be absolutely prohibited at the dictation of any public official, without just cause or reason, is void. (Portland v. Traynor, 418.)

Municipal Corporations—Ordinance for Licensing Food Establishments Sufficiently Definite.

14. Ordinance of the City of Portland, No. 35,013, providing if the location of a food establishment is found to be suitable, and in proper sanitary condition, according to the ordinances of the city and the regulations of the United States as to plumbing, etc., the bureau of health shall issue a food establishment permit or license to the applicant, is definite and certain, though there is no specification of what shall constitute physical fitness in an applicant for license, or suitability in the location. (Portland v. Traynor, 418.)

Municipal Corporations—City can Provide for Regulating Food and Soft Drink Establishments by Licenses.

15. Under its charter giving the City of Portland power to make regulations to prevent the introduction of contagious diseases, etc., the city had power and authority to adopt its ordinance No. 35,013, providing for the licensing of food and soft-drink establishments on approval of their location, physical examination of the proprietor, and payment of a fee. (Portland v. Traynor, 418.)

Municipal Corporations—City Entitled to Costs in Prosecution for Violation of Ordinance.

16. Under City of Portland Charter 1903, Sections 332, 333, 336, retained in charter of 1913 as ordinances, and under Sections 2494, 2498, L. O. L., city prosecuting defendants in municipal court for violation of ordinance *held* entitled upon judgment of conviction being affirmed by Circuit and Supreme Courts, to recover from defendants, as costs and expenses, attorney's fees and expenses of brief. (Portland v. Traynor, 418.)

NAVIGABLE WATERS.

Navigable Waters—Columbia River is a Navigable Stream.

1. The Columbia River is a navigable stream, and as such is a common highway "and forever free," and the right of navigation therein is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union. (Anderson v. Columbia Contract Co., 171.)

Navigable Waters—Unauthorized Obstruction to Navigation Does not Permit Its Negligent Destruction.

2. The public is entitled to navigate upon any part of the navigable waters of a stream without unlawful obstructions, and an obstruction erected under grant of authority beyond the limits of the orders of authorization is unlawful, and a nuisance only to the extent the authority was exceeded, and that it is wholly or partly unauthorized does not necessarily give a navigator authority to destroy it negligently. (Anderson v. Columbia Contract Co., 171.)

See Fish, 1-4.

NEGLECT.

See Appeal and Error, 29.

See Trial, 3.

Whether Destruction of Fish-traps by Tugboat was Negligence for Jury.

See Fish, 1, 3.

Instruction Limiting Jury to One Item of Negligence Properly Refused.

See Trial, 12.

NEGOTIABILITY.

See Bills and Notes, 11.

NEGOTIABLE INSTRUMENTS.

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NEW TRIAL.

New Trial—Newly Discovered Evidence That X-ray did not Disclose Alleged Fracture not Ground for New Trial.

1. A new trial was not required by newly discovered evidence that several months after plaintiff was injured by defendant's automobile she was X-rayed and informed that her rib was not broken nor spine twisted, where the evidence showed that the automobile knocked plaintiff down while it was on the left-hand side of the street, and that she was dragged or rolled a considerable distance, and was severely shocked and bruised, and was confined to a hospital some time. (Caldwell v. Hoskins, 567.)

New Trial—Plaintiff Severely Injured did not Wrongfully Suppress Evidence by not Offering X-ray not Showing Alleged Fracture.

2. Where plaintiff was knocked down by an automobile and dragged a distance, was painfully and severely injured, confined to the hospital for some time, and the physician who first examined her did not discover a broken rib or twist of spine to which her subsequent attending physician testified, plaintiff, by not offering an X-ray taken several months after the injury not showing the stated injuries, did not wrongfully suppress evidence so as to entitle defendant to new trial. (Caldwell v. Hoskins, 567.) —

See Criminal Law, 6.

NOMINAL DAMAGES.

See Landlord and Tenant, 3.

NOTICE.

See Appeal and Error, 15, 16, 27-29.

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See Bills and Notes, 14, 15.

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See Appeal and Error, 13, 14.

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See Divorce, 8.

Grantee must be Without Notice of Fraud.

See Fraudulent Conveyances, 1.

NOVATION.

Novation—Defense Showing Novation in Action on an Assigned Debt not Frivolous, Sham or Irrelevant.

1. In an action to recover a debt on an account stated between plaintiff's assignor and his employer, a defense showing a novation between the assignor, the employer and a third party, whereby the employer should discharge assignor's debt by paying it to the third party for stock purchased by assignor from such party, *held* not frivolous, sham or irrelevant, for such novation, if performed, would constitute a good defense to the action. (Murphy v. Oregon Engraving Co., 534.)

OATH.

Oath—Assessor has No Authority to Administer Oath.

1. There is no law upon the statute books of Oregon authorizing assessor to administer oath. (State v. Craig, 302.)

See Perjury, 1.

See Taxation, 1.

OFFICERS.

See Corporations, 1-5.

County Assessor not Authorized to Administer Oath.

See Perjury, 1.

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PERJURY.

Perjury—Oath Before County Assessor.

1. Perjury cannot be predicated on false list of taxable property sworn to before county assessor, since assessor is not authorized by Section 3592, L. O. L., as amended by Laws of 1913, Chapter 184, Section 4, or any other statute, to administer oath; authority to administer oath being, in every instance, expressly given (Section 889, L. O. L.), and not left to implication. (State v. Craig, 302.)

PERSONAL INJURY.

See Caldwell v. Hoskins, 567.

PLEADING.

Pleading—Amendment of Misdescription in Complaint to Quiet Title Allowed.

1. In suit to quiet title, controversy arising out of fact that survey disclosed a fence was located north of the line between the two

tracts of the parties as shown by the description of their deeds, where plaintiff intended to litigate the strip in dispute, but by mistake misdescribed the tract, it was proper for the court to permit him to file an amended complaint; defendant not being surprised. (Krueger v. Brooks, 119.)

Pleading—Separate Defense Should be Complete in Itself.

2. The new matter in defendant's second defense should be sufficient in itself, independent of all other parts of the answer, to constitute a defense. (Smith v. Martin, 132.)

Pleading—Sufficiency of Separate Defense Referring to Other Defense for Matter of Inducement.

3. In ejectment by vendor of land against the assignee of the contract, second defense by defendant assignee, though referring to its first and separate answer, *held* sufficient; the reference being matter of inducement leading to the essential part of the defense grounded in waiver or estoppel. (Smith v. Martin, 132.)

Pleading—Construction Against Pleader on Demurrer.

4. Upon demurrer to complaint, language of complaint must be construed most strongly against pleader. (Simpson v. First Nat. Bank, 147.)

Pleading—Denial of Answer by Reply as Creating Issue.

5. A demand of the answer, denied by the reply, is one of the issues for determination, though the prayer of the answer did not ask for affirmative relief on such account. (Oregon Engineering Co. v. West Linn, 234.)

Pleading—Item of Answer as Defense.

6. An item pleaded by the answer in reduction of any judgment recovered by plaintiff was *pro tanto* a defense. (Oregon Engineering Co. v. West Linn, 234.)

Pleading—Code Requires Concise Statement of Facts.

7. The Code does not require a pleader to conform his statement of facts to any of the common-law forms of action, a complaint containing a plain and concise statement of the facts constituting the cause of action being sufficient. (Lun v. Mahaffey, 292.)

Pleading—Departure in Action for Unlawful Ouster.

8. In action by lessee's assignee against lessor for unlawful ouster, where complaint alleged performance of requirements of lease by both plaintiff and her assignee in possession, reply alleging collusion or conspiracy between plaintiff's assignee and lessor in order to enable lessor to terminate lease, being inconsistent with complaint, was a departure therefrom. (Lun v. Mahaffey, 292.)

Pleading—Departure in Action for Unlawful Ouster.

9. In action for unlawful ouster by assignee of lease against lessor, where complaint alleged absolute performance of conditions of lease, reply pleading lessor's waiver of assignee's nonperformance of conditions of lease *held* a departure. (Lun v. Mahaffey, 292.)

Pleading—Affirmative Allegation in Answer as Denial of Affirmative Allegation in Complaint.

10. In a broker's action for commission on negotiating an exchange of properties, the affirmative allegation in the complaint that the purchaser procured owned his exchanged premises in fee simple, followed by denial in the answer, is sufficient after judgment and without timely objection, for the reason that such denial is the equivalent of an affirmative allegation of nonownership by such purchaser. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Pleading—Construction of Contract Set Out in Complaint.

11. Where plaintiff pleads a conclusion of fact as to the nature of the contract set out in the complaint, it is the duty of the court to consider the language of the instrument itself and give it the proper legal construction. (*Cranston v. California Ins. Co.*, 369.)

Pleading—Reply not a Departure from Complaint.

12. In an action by the purchaser of lambs for the seller's failure to deliver, where the complaint alleged that the seller failed and refused to deliver the lambs or any part of them, the allegation of the reply that those offered by the seller were undersized and unmerchantable, contrary to contract, did not constitute a departure. (*Stanfield v. Arnwine*, 381.)

Pleading—Complaint Stating Conclusion of Law Insufficient.

13. A replevin complaint, alleging that defendant unlawfully withholds and detains the property in question from plaintiff, states only a conclusion of law. (*Almada v. Vandecar*, 515.)

Pleading—Conclusion of Law.

14. A mere conclusion of law is not issuable, requires no denial, and does not aid a pleading. (*Almada v. Vandecar*, 515.)

Pleading—Legal Sufficiency of Defensive Matter to be Tested by Demurrer.

15. Sham, frivolous and irrelevant matter may be stricken out of a pleading; but its legal sufficiency as matter of defense must be tested by demurrer. (*Murphy v. Oregon Engraving Co.*, 534.)

Pleading—Cure of Defect by Subsequent Pleading.

16. Where complaint correctly set forth note sued upon, except that it omitted one phrase, but answer set forth note correctly and reply admitted such portion of answer, *held*, that pleadings, construed together, referred to note introduced in evidence. (*Nickell v. Bradshaw*, 580.)

See Bills and Notes, 13.

Amended Complaint Sufficient to Sustain Decree Based on Adverse Possession.

See Adverse Possession, 2.

Remand of Case to Permit Plaintiff to Amend Complaint.

See Appeal and Error, 7.

Truth of Facts Stated in Complaint on Demurrer.

See Appeal and Error, 8.

Insufficiency of Complaint to State Cause of Action may be Raised on Appeal.

See Appeal and Error, 24.

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See Bills and Notes, 1.

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See Contracts, 1.

Presumption that Agency is General.

See Principal and Agent, 1.

Presumption of Assignment of Lease.

See Trover and Conversion, 7.

PRINCIPAL AND AGENT.**Principal and Agent—Presumption That Agency is General.**

1. Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general. (*Rae v. Heilig Theater Co.*, 408.)

Principal and Agent—Acts of Agent Within Apparent Authority.

2. The principal is bound by the acts of his agent within the apparent authority conferred upon such agent. (*Rae v. Heilig Theater Co.*, 408.)

PROOF.**Must Correspond to Allegations in Indictment.**

See Forgery, 5.

PROPERTY.

See Husband and Wife, 1-4.

PROPERTY RIGHTS.

See Divorce, 14-18.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 1-8, 10-12.

QUESTION FOR COURT.**Construction of Stipulations and Orders in Other Suit.**

See Trial, 14.

QUESTION FOR JURY.

See Attorney and Client, 1.

See Corporations, 5.

See Criminal Law, 18.

See Fish, 2, 3.

QUIETING TITLE.**Quieting Title—Equity has Jurisdiction of Suit by Party in Possession.**

1. Equity had jurisdiction of a suit to quiet title, brought by a party in possession of the land in dispute, since he could not prosecute an action in ejectment, and in the suit he had a right to have title adjudicated. (*Krueger v. Brooks*, 119.)

Quieting Title—Record Title is Cloud on Title by Adverse Possession.

2. The deed to the owner of the record title is a cloud on the title acquired by adverse possession which the party having title by adverse possession may sue to remove. (*Looney v. Sears*, 690.)

See Pleading, 1.

RATIFICATION.

See Corporations, 2.

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See Criminal Law, 16, 17.

RECEIPT.

See Forgery, 3, 11.

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See Chattel Mortgages, 3.

REDEMPTION.

Equity of Redemption not of Common-law Origin.

See Mortgages, 2.

REPLEVIN.

Replevin—Not Maintainable Unless Plaintiff Entitled to Possession.

1. Replevin is essentially a possessory action, and, unless plaintiff has the right of immediate possession, he cannot prevail. (*Almada v. Vandecar*, 515.)

Replevin—Complaint Failing to Show Right to Possession Insufficient.

2. A replevin complaint, alleging that plaintiff was the owner of a steer when it was taken from him by defendant, but not alleging that plaintiff was entitled to the possession at the time the action was commenced, which was some two years later, held insufficient to support a judgment for plaintiff. (*Almada v. Vandecar*, 515.)

RETREAT.

See Homicide, 5.

REVIEW.

Rulings on Evidence Unnecessary.

See Appeal and Error, 2.

See Criminal Law, 5.

Review of Refusal to Grant Nonsuit.

See Appeal and Error, 18.

Findings Supported by Evidence not Reviewable.

See Appeal and Error, 9, 11, 25, 31.

Review of Decision Concerning Capability of Child Witness.

See Criminal Law, 12.

RIPARIAN RIGHTS.

See Waters and Watercourses, 4.

SALES.

Sales—Delivery.

1. If buyer, after inspecting onions in a bin, agreed to take them as they ran without sorting, and designated the place where they

were to be delivered and the agent to take them in charge at that place, and the onions were so delivered, they became at that moment defendant's property. (*Naftzger v. Henneman*, 109.)

Sales—Right to Inspect.

2. Where buyer inspected onions when he purchased them, he was not entitled to again inspect them, in the absence of a claim that seller attempted to deliver other onions. (*Naftzger v. Henneman*, 109.)

Sales—Action for Price—Instructions.

3. In an action for the purchase price of onions, which defendant denied that he accepted, it would have been error to instruct that plaintiff could not recover, unless defendant promised to pay therefor the "specific sum of \$674.40," as such instruction would require the jury to find for the defendant if it appeared upon the trial that the price agreed upon had been a dollar less or a dollar more than \$674.40. (*Naftzger v. Henneman*, 109.)

Sales—Right to Inspect After Delivery.

4. Where buyer of onions inspected them in a bin, and agreed to buy them in certain grades at certain prices, seller to deliver them sorted and graded, buyer was entitled, after delivery, to a reasonable time to inspect and ascertain whether the onions had been so sorted and graded. (*Naftzger v. Henneman*, 109.)

Sales—Failure by Seller of Performance.

5. If seller failed to deliver sorted and graded onions, and that was the agreement, he failed to perform, and could not recover the purchase price, unless the onions as delivered were accepted by the buyer or his agent as performance. (*Naftzger v. Henneman*, 109.)

Sales—Action for Price—Unsubstantial Variance Will not Relieve Purchaser.

6. A slight, unsubstantial variance in quality of onions contracted to be delivered would not relieve the purchaser from payment. (*Naftzger v. Henneman*, 109.)

Sales—Tender of Goods—Compliance With Agreement.

7. While tender of goods "entirely different" from those contracted for would justify a rescission, it would be erroneous to instruct a jury that a purchaser is not justified in refusing to perform his contract and pay for the goods tendered, unless they are "entirely different" from those contracted for. (*Naftzger v. Henneman*, 109.)

Sales—Trial—Effect of Erroneous but Honest Rejection of Goods Offered—Instructions not Applicable to Evidence.

8. In action by buyer of lambs for seller's failure to perform, wherein the seller counterclaimed for the buyer's breach, the buyer was liable on the seller's counterclaim if the seller had in truth complied with the contract, even though the buyer honestly rejected the lambs offered as falling below his construction of the requirements of the contract, and instructions relative to the buyer's right to recover the part of the price paid in case of an honest rejection were not pertinent to the issues. (*Stanfield v. Arnwine*, 381.)

Sales—Waiver of Contract Provision as to Method of Measurement of Hay Sold.

9. Provision in contract for sale of hay crop that the buyer should stack it for measurement could be waived, either by a subsequent agreement that part of the hay taken by buyer for immediate use should be weighed, or by seller's estoppel to deny such waiver, by conduct luring the buyer into a situation where he would be in the plight of a covenant breaker liable for damages for breach where none was intended, such as, without objection, allowing the buyer to take such hay without stacking it for measurement. (*Propst v. William Hanley Co.*, 397.)

Sales—Burden of Proof on Purchaser in Action for Breach of Contract.

10. In an action by a purchaser for breach of a contract to deliver potatoes, the burden was on him to show, not only that he had complied with the conditions of the contract on his part, or that he was ready to comply at the time and place fixed by the contract, but also that defendant failed to deliver or have the potatoes ready for delivery on payment by plaintiff. (*J. L. Price Brokerage Co. v. Baker Grocery Co.*, 538.)

Sales—Purchaser's Duty to Accept Delivery and Make Payment.

11. Where potatoes have been sold to be delivered at a designated point, the purchaser must be on hand, either in person or by some authorized representative, to accept the potatoes and pay the price, and he cannot insist that the potatoes be billed or shipped to him from such point until payment is made; the seller having stipulated for payment through a bank at that point. (*J. L. Price Brokerage Co. v. Baker Grocery Co.*, 538.)

See Appeal and Error, 5.

See Statute of Frauds, 1.

Value may be Proved by Showing Amount Realized at Sales.

See Evidence, 11.

Inadmissible When in Conflict With Written Stipulation.

See Evidence, 12.

SELF-DEFENSE.

See Homicide, 3-7.

SOFT-DRINK ESTABLISHMENTS.

See Licenses, 2.

See Municipal Corporations, 15.

SPECIFIC PERFORMANCE.**Specific Performance—Performance by Plaintiff—Necessity.**

1. The court cannot decree specific performance by the seller of a contract for the sale of land, where the buyer's assignee, who asks relief, has not specifically performed and does not tender performance in full, but simply expresses its willingness. (*Smith v. Martin*, 132.)

STARE DECISIS.

Applies With Peculiar Force to Decision on Constitutional Questions.
See Courts, 3.

STATES.**States—Automatic Succession to Governorship on Death During Term.**

1. Under Article V, Section 8, of the Constitution, in case of death of the governor during his term of office, the secretary of state becomes governor to serve for the unexpired term of four years provided by Sections 1 and 7 and Section 8 providing a line of automatic succession from governor to secretary of state and to president of the senate, having been adopted to prevent a vacancy in the office of governor. (*State v. Olcott*, 633.)

STATUTE OF FRAUDS.**Frauds, Statute of—Sales of Personalty—Action for Price.**

1. If buyer, after inspecting onions in a bin, agreed to take them as they ran without sorting, and designated the place where they were to be delivered and the agent to take them in charge at that place, they became at that moment defendant's property, and the statute of frauds does not apply in an action by the seller for the purchase price. (*Naftzger v. Henneman*, 109.)

Frauds, Statute of—Broker's Oral Agreement for Sale of Real Estate.

2. In a landlord's action to remove a lease as a cloud upon title, tenant's answer, claiming damages for alleged breach of real estate broker's oral agreement, although demurrable in view of Section 808, L. O. L., nevertheless, since the allegations of the answer were traversed, the defendant was put to proof, as under such section the oral contract was void, and evidence other than the writing or secondary evidence of its contents inadmissible. (*Shaw v. Corbett*, 270.)

STATUTES.**Statutes—Liberal Construction of Remedial Enactments.**

1. While statutes conferring special privileges on individuals should be construed strictly against them, enactments to redress existing grievances and for the protection of rights are remedial and should be liberally interpreted. (*Wright v. Wimberly*, 1.)

Statutes—Construction of Negotiable Instruments Law.

2. Rules of law-merchant, while not controlling, are at least helpful when construing the negotiable instruments law. (*Simpson v. First Nat. Bank*, 147.)

Statutes—Construction of Negotiable Instrument Act.

3. Common-law precedents and discussions, by text-book writers of the rules of the law-merchant are valuable in ascertaining the meaning of negotiable instrument act. (*Simpson v. First Nat. Bank*, 147.)

See Constitutional Law, 1, 3, 4.

See Interest, 2.

See Mortgages, 1.

See Pleading, 7.

See Taxation, 1, 3, 4.

See Waters and Watercourses, 4.

Giving Assessor Authority to Administer Oath Repealed.
See Taxation, 1.

STIPULATION.

Stipulations—Construction of Stipulation That Payment to Plaintiff Should be Without Prejudice to Rights.

1. A clause, "said payment to be without prejudice to the rights of any of the parties to this suit," in a stipulation in an action to recover part of the estate of a deceased person wherein it was agreed that plaintiff was entitled to at least \$50,000, which was given her, held to refer to litigation as to the balance of the fund, and not to the amount paid plaintiff. (*Dolph v. Speckart*, 550.)

Construction of Stipulations and Orders in Other Suit.
See Trial, 14.

STREET IMPROVEMENTS.

See Municipal Corporations, 1-8.

SUCCESSION.

Succession to Governorship on Death During Term.
See States, 1.

TAXATION.

Taxation—Statute Giving Assessor Authority to Administer Oath Repealed.

1. Act of 1854 (Deady's Code, c. 2, § 3; B. & C. Comp., § 3059), requiring the assessor to swear every person subject to taxation, was expressly repealed by Laws of 1907, Chapter 268, Section 39. (*State v. Craig*, 302.)

Taxation—Holder of Record Title is not Entitled to Reimbursement from Adverse Claimant for Taxes Paid.

2. The holder of the record title to land in the adverse possession of another was paying taxes on his own land during the ten years necessary to give title to the adverse claimant, and thereafter was a mere volunteer with no right to reimbursement from the adverse claimant. (*Looney v. Sears*, 690.)

Taxation—Record Owner Redeeming from Tax Sale not Entitled to Reimbursement from Adverse Holder.

3. Under Section 3124, B. & C. Comp., providing that any redemption from a tax sale shall inure to the benefit of the person having the legal or equitable title subject to the right of the person making the redemption to reimbursement by the person benefited, the redemption by the owner of the record title of land in the adverse possession of another inures to his own benefit and gave him no right to reimbursement. (*Looney v. Sears*, 690.)

Taxation—Right of Person Redeeming from Tax Sale is Governed by Statute Then in Force.

4. Laws of 1907, page 480, Section 69, requiring one suing to remove the cloud of a tax title to deposit all payments by the purchaser with interest, gave no right to interest to one redeeming from

a tax sale in 1904, in view of Section 80, continuing the old statute in force as to taxes previously accruing. (*Looney v. Sears*, 690.)

Record Owner of Land in Adverse Possession of Another is not Entitled to Interest on Taxes Paid.

See Damages, 2.

See Sales, 7.

TENDER.

THREATS.

See Homicide, 4.

TIME.

Failure to File Transcript or Abstract.

See Appeal and Error, 32.

Extension of Time to Prepare Bill of Exceptions.

See Criminal Law, 8.

TITLE.

Adverse Possession for Requisite Period Vests Title in Possessor by Operation of Law.

See Adverse Possession, 3.

Title by Adverse Possession.

See Adverse Possession, 4-6.

Record Owner of Land in Adverse Possession of Another is not Entitled to Interest on Taxes Paid.

See Damages, 2.

Title by Adverse Possession Available as Defense.

See Ejectment, 1.

Record Title is Cloud on Title by Adverse Possession.

See Quieting Title, 2.

TRIAL.

Trial—Instruction Defective in Part Properly Refused.

1. Where a requested instruction contains an erroneous proposition, the court is not bound to separate the chaff from the wheat, and give that part of the request which states the law correctly. (*Naftzger v. Henneman*, 109.)

Trial—Misleading Instructions.

2. In action for purchase price of onions, where the evidence was in conflict as to the terms of the contract, delivery and acceptance, it was misleading to instruct as to substantial performance, slight or partial dereliction, and effect of delivery by seller of property to third person, etc.; there being no question of substantial performance, or partial dereliction, or intent of seller to repudiate or transfer the property to a third person. (*Naftzger v. Henneman*, 109.)

Trial—Instruction Omitting Reference to Negligence Cured by Subsequent Instruction.

3. In an action for destruction of a fish-trap by a tug, an instruction as to defendant's negligence that "it is charged" "that the boat was being operated outside of and beyond the channel or course in which vessel should be operated," while insufficient, when standing alone, for omission to allege "negligently operated," the error was cured by another instruction covering negligent operation. (*Anderson v. Columbia Contract Co.*, 171.)

Trial—Instruction—Cure of Error by Other Instruction.

4. A party cannot claim that an erroneous instruction was not prejudicial because another instruction correctly stated the law, where the erroneous instruction stood out as boldly and prominently as the proper instruction. (*Anderson v. Columbia Contract Co.*, 171.)

Trial—Finding of Facts by Judge Specific as in Special Verdict.

5. Where the parties to an action waive their rights to a jury, the findings of the trial judge are in the nature of a special verdict, and the judge must find the facts as particularly as is required in a special verdict returned by a jury. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—Finding of Facts by Special Verdict.

6. A special verdict must find all the facts essential for a judgment, but ultimate and constitutive, rather than evidentiary, facts should be stated. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—Adequacy of Special Verdict Stating Findings on Issue Determining Case.

7. A special verdict must pass on all the material issues, yet will be adequate if it states sufficient findings on an issue ultimately determining the case and necessarily supporting the judgment rendered so that other issues become immaterial. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—Findings of Judge Being Only Conclusions of Law Insufficient.

8. If the findings made by the trial judge are not in-truth findings of fact, but only conclusions of law, the judgment cannot stand because it must be supported by a statement of ultimate facts. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—"Evidentiary Fact" Defined.

9. An "evidentiary fact" is one that furnishes evidence of the existence of some other fact. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—"Ultimate Fact" Defined.

10. An "ultimate fact" is the final resulting effect reached by processes of legal reasoning from the evidentiary facts. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—"Fact in Issue" on Which Complaint is Based and Which Defendant Controvers.

11. In a realty broker's action for commission in negotiating an exchange of properties, question of whether or not the purchaser pro-

cured was the owner in fee simple of his lands to be exchanged *held* a "fact in issue," defined as that on which plaintiff proceeds by his action, and which defendant controverts in his pleadings, so that findings thereon were findings of ultimate fact and not mere conclusions of law. (*Oregon Home Builders v. Montgomery Inv. Co.*, 349.)

Trial—Instruction Limiting Jury to One Item of Negligence Properly Refused.

12. In an action under the employers' liability law for a servant's death in a collision between an engine on which he was riding and a runaway logging-car, where there was evidence of negligence in not using snubbing lines and safety switches, an instruction limiting the jury to consideration of one item of negligence, based upon a defective drift-pin, which permitted the brake to loosen, was properly refused. (*Garvin v. Western Coöperage Co.*, 487.)

Trial—Memoranda of Seller not Open to Exclusion on Blanket Objection.

13. In an action to recover for building materials sold and delivered under an express contract, plaintiff's memoranda, consisting of delivery slips executed in triplicate, one copy of which was kept as a permanent record, *held* not rendered inadmissible by defendant's omnibus objection that they were incompetent, irrelevant, and immaterial under the allegations, and because the complaint designated a specific contract for a specific sum, while the memoranda disclosed a different sum. (*Miller Lum. Co. v. Davis*, 507.)

Trial—Construction of Stipulations and Orders in Other Suit Question for Court.

14. In an action by an attorney for damages for breach of a contract of employment under which he was to receive as compensation a certain percentage of the amount recovered, the client, having employed other counsel, who brought action in the federal court, wherein certain stipulations were entered into concerning the amount due the client, the construction of orders entered in the federal court and stipulations therein was for the court. (*Dolph v. Speckart*, 550.)

Trial—Instructions Covered by Those Given Properly Refused.

15. Where the instructions given fully covered every point embraced by the requested instructions, they were properly refused. (*Caldwell v. Hoskins*, 567.)

Trial—Motion to Strike Covering Objectionable Testimony Only Properly Granted.

16. Proceedings at trial *held* to show that plaintiff's motion to strike defendant's testimony and the court's ruling thereon went to the exclusion only of defendant's narration of her conversation with physician, and did not exclude her conversations with plaintiff containing a competent admission by plaintiff. (*Caldwell v. Hoskins*, 567.)

See Sales, 8.

Failure to Try Accused at First Term of Court.

See Criminal Law, 9.

Accumulation of Undetermined Cases Good Cause for Postponement.
See Criminal Law, 10.

TROVER AND CONVERSION.

Trover and Conversion—Leasehold Interest not Personal Chattel.

1. A leasehold interest in a building for a five-year term was not a personal chattel, and therefore not the subject of trover. (*Lun v. Mahaffey*, 292.)

Trover and Conversion—Possession is Sufficient Proof of Ownership Against One Showing No Title.

2. Actual possession of a chattel at the time of the conversion thereof is sufficient evidence of title, in trover against one who shows no title. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Possession Under Claim of Title of Land is Proof of Ownership of Machinery Taken Therefrom.

3. Possession of land, either under title or under claim of title, is sufficient proof in trover of the ownership of machinery appurtenant thereto and taken therefrom. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Deed and Lease Held Sufficient Proof of Title to Machinery on Land.

4. A warranty deed to plaintiff under which it was in possession and a lease of the land making the machinery thereon the property of the lessor is sufficient proof of plaintiff's ownership of the machinery to avoid a nonsuit. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Testimony That Plaintiff Owned "Mill" is Evidence of Ownership of the Machinery.

5. Testimony that plaintiff owned the sawmill is evidence that it owned the machinery therein, since the term "mill," in modern usage, includes various machines or combinations of machinery. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Proof of Title from Source to Land from Which Machinery was Taken Unnecessary.

6. To recover for the conversion of machinery in a sawmill vested in plaintiff under a lease by it of the mill site, proof of chain of title to the mill site from the government is unnecessary. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Landlord and Tenant—Proof That Stranger Held Under Lease Raises Presumption of Assignment.

7. Oral proof that a corporation, not the lessee, took possession of the leased property and held it under the terms of the lease, installing the machinery as agreed therein, is admissible, and raises the presumption of assignment of the lease. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Measure of Damages is Market Value.

8. The measure of damages for the conversion of personal property is the market value of the property at the time and place of the conversion. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—Evidence of Value Held Sufficient to Avoid Nonsuit.

9. Testimony of two witnesses as to the value of the machinery converted held sufficient evidence of value to avoid a nonsuit. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Trover and Conversion—"Reasonable Value," "Fair Cash Value," and "Actual Cash Value" are Synonyms.

10. "Reasonable value," or "fair cash value," and "actual cash value" are practically synonymous terms, and mean the fair or reasonable cash price for which the property can be sold on the market. (*Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.)

Action for Conversion of Mill Machinery is Transitory.

See Courts, 4.

TRUSTEE.

See Bankruptcy, 24.

See Trusts.

TRUSTS.**Trusts—Termination for Dereliction of Trustees.**

1. Trustees holding apartment house property for a divorced husband and wife should have acted with promptness and efficiency in collecting and securing rents from the property, instead of letting it run constantly behind, into danger of being entirely exhausted and eaten up by expenses, and for failure to do so the trust was properly terminated at suit of husband and wife. (*Kiesendahl v. Ganoe*, 283.)

Trusts—Reimbursement of Trustees for Money Borrowed.

2. Where trustees of apartment house property for a divorced husband and wife acted in good faith in borrowing money to pay taxes and other expenses on the property, and to buy furniture left in the house by a tenant, and to buy a judgment against her under which the furniture might be levied upon, they should not lose the money they put up for the benefit of the estate, and the *cestuis* cannot have reconveyance of the trust property until any amounts due on the notes have been paid or the trustees discharged in some way. (*Kiesendahl v. Ganoe*, 283.)

Trusts—Payment of Compensation to Trustees Before Reconveyance on Termination.

3. The amount due trustees for their services should be paid by the *cestuis* before reconveyance to them by the trustees on termination of the trust by court decree. (*Kiesendahl v. Ganoe*, 283.)

Trusts—No Continuance of Trust to Protect Unjeopardized Claims of Creditors.

4. When a trust is being constantly operated at a loss, and the property of the *cestuis* is ample to protect all the rights of creditors

not made parties to the suit for termination of the trust, it should not be continued merely to secure the claims of such creditors. (*Kiesendahl v. Ganoë*, 283.)

UNITED STATES STATUTES.

Cited and Construed in this Volume.

See Table in Front of this Volume.

VENDOR AND PURCHASER.

Vendor and Purchaser—Assignment of "Contract"—Clause Prohibiting.

1. The parties to a contract for the sale of land could provide that it should not be assigned without the written consent of the vendor; a "contract" being an agreement between two or more parties, competent to contract, on a sufficient consideration, to do or not to do a particular thing which lawfully may be done or omitted. (*Smith v. Martin*, 132.)

Vendor and Purchaser—"Waiver" of Provision Against Assignment—Proof by Parol—"Waiver" Defined.

2. The vendor of land by contract stipulating against assignment without his written consent may waive, if he chooses, such provision of the contract for his benefit, and the "waiver," a voluntary relinquishment of one's known right by acts or by acceptance of benefits, may be proved by parol and circumstantial evidence as well as direct testimony. (*Smith v. Martin*, 132.)

Vendor and Purchaser—Pleading Waiver of or Estoppel to Enforce Stipulation Against Assignment Without Consent.

3. In a vendor's action of ejectment against the assignee of the contract, which stipulated against assignment without the vendor's written consent, second separate defense of the assignee, grounded in waiver of or estoppel to enforce the stipulation against assignment without written consent, *held* to state a good defense, either on the ground of waiver or estoppel, which merge into one another. (*Smith v. Martin*, 132.)

Vendor and Purchaser—Assignment of Contract—Vendor not Entitled to Possession Against Assignee.

4. Where land was sold by contract stipulating against assignment without the vendor's written consent, the vendor cannot secure possession from an assignee of the contract without his consent on the ground that the waiver of the condition against assignment did not dispense with the stipulation of the contract against giving possession to an assignee without permission of the vendor, one of its conditions being that the purchaser was entitled to possession as long as he complied with the requirements as to payment, which right would pass by assignment of the contract. (*Smith v. Martin*, 132.)

Vendor and Purchaser—Assignment of Contract—Waiver of Written Consent to Assignment.

5. Evidence *held* to show waiver by the vendor of land in favor of the assignee of the contract of its provision requiring the written consent of the vendor to any assignment. (*Smith v. Martin*, 132.)
See Estoppel, 1.

VERDICT.

- See Appeal and Error, 21.
See Forgery, 13.
See Justices of the Peace, 1, 3.

When Defendant Entitled to Costs and Disbursements.

- See Costs, 1.

WAIVER.

- See Contracts, 4.
See Estoppel, 1.
See Sales, 9.
See Vendor and Purchaser, 2-5.

WATERS AND WATERCOURSES.

Waters and Watercourses—Right of Owner to Improve Basements Appurtenant to Mill-race.

1. Where owner of mill-race had an easement in property along the side of the race in that it had the right to widen the same when necessary, abutting owner, who undertakes to improve and occupy the land abutting on the mill-race, is not a trespasser, unless his occupation or improvement is such as interferes with the operations of the owner of the mill-race. (*Gamma Alpha Bldg. Assn. v. Eugene*, 80.)

Waters and Watercourses—Franchise in Streets—Forfeiture.

2. A franchise contract between a city and another for the laying and protection of water-mains, providing that the rights and privileges thereunder might be forfeited by any future council upon failure to supply a sufficient amount of water, is within the rights of the parties who may thus contract about the remedy for breach. (*Newsom v. City of Rainier*, 199.)

Waters and Watercourses—Legislative Power of Council to Declare a Franchise Void by Ordinance.

3. The city council is a legislative body, and, in respect to perpetuating or ending a water supply franchise ordinance containing a provision that rights thereunder might be forfeited by the council for breach, could forfeit such rights only by means of a repealing ordinance declaring the franchise ordinance void. (*Newsom v. City of Rainier*, 199.)

Waters and Watercourses—Acquisition of Water Rights by Appropriation not Dependent on Riparian Ownership.

4. A water right acquired by an appropriation and beneficial use upon land in the quiet possession of the appropriator, and upon which he has made valuable improvements and reclaimed in part, is not dependent upon the title to the soil upon which the water

is used, in view of Rev. Stats. U. S., Section 2339 (U. S. Comp. Stats., § 4647), Sections 6534, 6561, L. O. L., Section 6594, as amended by Laws of 1913, page 273, and Section 6595, and Laws of 1913, page 531. (*Laurance v. Brown*, 387.)

WITNESSES.

Witnesses—Question Establishing Affirmative Defense not Proper Cross-examination.

1. In an action for the death of a servant by collision of a truck with an engine upon which the servant was riding, it was error for defendant to ask plaintiff's witness what kind and make the truck was, when witness had not testified as to the trucks, since such question was clearly directed toward establishing an affirmative defense and was not proper cross-examination. (*Garvin v. Western Cooperage Co.*, 487.)

Witnesses—Inconsistent Testimony in Former Proceeding Concerning the Same Accident Admissible.

2. In view of Section 861, L. O. L., it was proper, in an action against employer for the death of a servant, to ask a witness about his testimony at a coroner's inquest relative to same accident, for the purpose of impeachment, where there was an apparent inconsistency. (*Garvin v. Western Cooperage Co.*, 487.)

Witnesses—Competency of Children.

3. Whether proffered witnesses under 10 years of age are incapable of receiving just impressions of facts respecting which they are examined within the meaning of Section 732, L. O. L., is a question for the decision of the trial judge who sees them, hears them and has opportunity to test their understanding and intelligence to his satisfaction. (*State v. Bateham*, 524.)

Witnesses—Criminal Law—Cross-examination of Character Witnesses.

4. In a prosecution for taking liberties with a female child, defendant having put witness on the stand to testify to his reputation as a moral, law-abiding man, prosecution was properly permitted, on cross-examination of the witnesses, to ask if the witnesses had ever heard of the defendant's taking improper liberties similar to that described in the indictment with the person of another female child, naming such child, and the matter of cross-examination, where an accused tenders his supposed good character in evidence, rests largely within the discretion of the trial judge but is subject to review in case of abuse of discretion. (*State v. Bateham*, 524.)

See Criminal Law, 14.

WORDS AND PHRASES.

"Accomplice"—See *State v. Bateham*, 524.

"Actual cash value"—See *Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.

"Consummation of deal"—See *Oregon Home Builders v. Montgomery Inv. Co.*, 349.

"Contract"—See *Smith v. Martin*, 132.

"Decree"—See *Wright v. Wimberly*, 1.

- "Encumbrances"—See *Estep v. Bailey*, 59.
"Evidentiary fact"—See *Oregon Home Builders v. Montgomery Inv. Co.*, 349.
"Fact in issue"—See *Oregon Home Builders v. Montgomery Inv. Co.*, 349.
"Fair cash value"—See *Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.
"Farmer"—See *State ex rel. v. Hines*, 607.
"Good cause"—See *State v. Bateham*, 524.
"Guaranty"—See *Simpson v. First National Bank*, 147.
"Judgment"—See *Wright v. Wimberly*, 1.
"Mill"—See *Montesano Lum. & Mfg. Co. v. Portland Iron Works*, 677.
"Ranch"—See *State ex rel. v. Hines*, 607.
"Real estate broker"—See *Oregon Home Builders v. Montgomery Inv. Co.*, 349.
"Reasonable value"—See *Montesano Lum. Mfg. Co. v. Portland Iron Works*, 677.
"Ultimate fact"—See *Oregon Home Builders v. Montgomery Inv. Co.*, 349.
"Waiver"—See *Smith v. Martin*, 132.
"Warrant"—See *Simpson v. First Nat. Bank*, 147.

WORKMEN'S COMPENSATION ACT.

See *Master and Servant*, 1.

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